

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

XpertUniverse, INC.,) Trial Volume 7
)
 Plaintiff,)
) C.A. No. 09-157 (RGA)
v.)
)
)
CISCO SYSTEMS, INC.,)
)
 Defendant.)

Wednesday, March 20, 2013
9:08 a.m.

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE RICHARD G. ANDREWS
United States District Court Judge

APPEARANCES:

POTTER ANDERSON & CORROON, LLP
BY: PHILIP A. ROVNER, ESQ.

-and-

STROOCK & STROOCK & LAVAN
BY: CHARLES E. CANTINE, ESQ.
BY: JASON SOBEL, ESQ.
BY: CLAYTON McCRAW, ESQ.

Counsel for the Plaintiffs

APPEARANCES CONTINUED:

MORRIS NICHOLS ARSHT & TUNNELL, LLP
BY: JACK B. BLUMENFELD, ESQ.

5

-and-

MORGAN LEWIS & BOCKIUS, LLP
BY: BRETT M. SCHUMAN, ESQ.
BY: KELL M. DAMSGAARD, ESQ.

Counsel for the Plaintiffs

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(Proceedings commenced at 9:08 a.m.)

THE COURT: Good morning, everyone.

Please be seated.

(Counsel respond, "Good morning.")

5 THE COURT: So what's on your minds?

MR. SCHUMAN: Good morning, your
Honor.

THE COURT: Good morning.

MR. SCHUMAN: I think before we get
10 to, I know jury instructions and the verdict
form, there are still some issues there, a couple
of issues.

We want to move a couple of the
deposition excerpt exhibits in evidence. I don't
15 think there is any written objection.
Mr. Sinclitico is going to handle that.

There's also one, I think one
remaining dispute regarding some deposition
excerpts that XpertUniverse would like to play as
20 part of its rebuttal case and we had made

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THE COURT: All right.

MR. SINCLITICO: Good morning, your
Honor.

THE COURT: Good morning,

5 Mr. Sinclitico.

MR. SINCLITICO: The first issue
that we'll address is the deposition testimony
that XU is attempting to play in its rebuttal
case, and that's from Faro, one of the developers
10 from XpertUniverse.

I have copies of the excerpts they
have designated --

THE COURT: All right.

MR. SINCLITICO: -- absent the
15 highlighting that our previous copies have had.
There are no counterdesignations. We're just
objecting to it in its entirety.

THE COURT: I got it. I understand
that.

20 MR. SINCLITICO: And the issue, your

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same thing.

The issue, your Honor, that's addressed in the testimony is that of integration between XpertUniverse's product and the Cisco product.

Our position is that rebuttal, the rebuttal case should be limited to new theories that were brought up for the first time in defendant's case-in-chief.

THE COURT: All right. I got that.

MR. SINCLITICO: Okay. And all of these issues were brought up not only in their opening, but in XU's affirmative case, and it seems to be an attempt to just get the last word on this question of whether XU had completed integrated product.

THE COURT: All right.

(Pause.)

THE COURT: All right. Mr. Cantine, Mr. Sobel, what about the claim that this should have been part of your case if you wanted it in?

MR. SOBEL: Yes. This is a rebuttal to Abe Zelkin's testimony that they brought. You might recall, they played two separate disjointed

clips. One was a clip, which he said nothing was
--

THE COURT: Right. The second one
was about his resumé.

5 MR. SOBEL: Because they want to
establish that his date that he was there through
the whole time that the integration was going on,
and they used --

THE COURT: Was it like July 2006?

10 MR. SOBEL: What did you say?

THE COURT: Was it July 2006 when he
left?

MR. SOBEL: 2007.

THE COURT: Oh, okay.

15 MR. SOBEL: But in the first clip,
they had some conclusory testimony that this
wasn't complete. But if you see in Ms. Faro's
transcript, she had direct personal knowledge.
She was working on it and testing it.

20 And so they want to bring in a
21 conclusory statement, and now we have a rebuttal
22 to that saying, this is the person with the
23 actual direct knowledge.

24 THE COURT: Well, let me ask you

this. Was there any testimony during your case-in-chief that integration was completed some time in 2006?

MR. SOBEL: Yes.

5 THE COURT: From whom?

MR. SOBEL: Well --

MR. CANTINE: Victor Friedman, Elizabeth Eiss and John Steinhoff. Maybe not Steinhoff.

10 MR. SOBEL: Yes. At least two or three witnesses.

THE COURT: Probably not Mr. Steinhoff because he left before.

15 MR. CANTINE: I don't think he testified at that. Sorry.

MR. SOBEL: No.

20 THE COURT: All right. I'm going to exclude it. I mean, basically, when the issue was raised in your case-in-chief, that's the time to put in the detailed evidence if you want it or

21 not. So I'm going to exclude that.

22 What's the other issue,

23 Mr. Sinclitico?

24 MR. SINCLITICO: The other issue,

your Honor, is just moving in some of the exhibits that were authenticated in the deposition read-ins from yesterday.

THE COURT: Okay.

5 MR. SINCLITICO: The first one is Defendant's Exhibit 827, which was the linked in bio from Abraham Zelkin.

MR. CANTINE: We're going to object to that. What they are trying to establish is
10 that Mr. Zelkin stayed there through whatever, 2007. The truth is, he was in a business development role for his last eight, nine months while he was there.

THE COURT: Well, the truth is, I
15 don't care -- you know, I hate to have this on the record, but I don't actually care what the truth is. You know, it's what the evidence is that's important.

MR. CANTINE: Well, that's exactly
20 why we want to put in Ms. Faro. They're going to suggest he was the chief technology developer and
21 he was there until sometime in 2007 and his
22 testimony was the integration was never complete.
23 That's why they want to put it in.
24

THE COURT: Right.

MR. CANTINE: That is why they want
to put it in.

THE COURT: I understand why they
5 want to put it in.

MR. CANTINE: That's why we want Ms.
Faro.

THE COURT: And so your objection is
what?

10 MR. CANTINE: I think it's
prejudicial. It's confusing the jury on an
issue, an important issue. And if they want to
put that in, I think we ought to have Ms. Faro's
testimony in.

15 THE COURT: All right. I got you on
that point. And if the objection is Rule 403, I
don't think it's, whatever prejudicial value it
has substantially outweighs its probative value,
so that's overruled.

20 Anything else, Mr. Sinclitico?

21 MR. SINCLITICO: Yes, your Honor.

22 The various e-mails that were authenticated
23 during the deposition testimony from Mr. Turillo
24 that was read yesterday. We can go through them

one by one.

THE COURT: Is there an objection?

You didn't talk to Mr. Cantine about this?

MR. CANTINE: Are you just talking
5 about Turillo e-mails?

MR. SINCLITICO: Yes, the Turillo
e-mails that were authenticated in the testimony.

MR. CANTINE: There's no objection.

THE COURT: All right. Why don't
10 you just put on the record what they are.

MR. SINCLITICO: That is Defendant's
Exhibit 524, Defendant's Exhibit 523, Defendant's
516, Defendant's 515, Defendant's 511,
Defendant's 505, Defendant's 362, Defendant's
15 500, Defendant's 520, and Plaintiff's 717.

THE COURT: All right. And just
give -- and, Mr. Cantine, I take it, having heard
the numbers, there's still no objection?

MR. CANTINE: I will accept his
20 representation that they are all the e-mails,
21 your Honor.

THE COURT: All right. So they are
22 admitted.
23

24 (Exhibits admitted into evidence.)

Anything else?

MR. SINCLITICO: No, your Honor.

THE COURT: All right. Mr. Cantine,
Mr. Sobel, is there anything else you want to
5 bring up right now?

MR. SOBEL: I think the only
outstanding issue was the punitive damages, jury
instruction.

THE COURT: All right. Well, before
10 I get to that, I didn't get anything -- I mean, I
got Mr. Rovner's e-mail. I got Mr. Blumenfeld's
e-mail. And do we have a working version of the
verdict form?

MR. SOBEL: We sent a copy of our
15 proposed verdict form, but I have not seen their
edited.

THE COURT: All right. So here's
what I think about the issues that I actually
think are outstanding in relation to the jury
20 instructions, and actually, let me ask. Is there
21 a revised set of jury instructions floating
22 around?

23 MR. SOBEL: Yes.

24 THE COURT: What you are handing up,

Mr. Sobel, is that -- what's the status of these
in terms of --

MR. SOBEL: The status is that last
night I sent out a version that was incomplete
5 and didn't have your instructions. I realized
that this morning when I woke up. I sent it out
to them and just gave them a printed copy. And
that -- so they have not confirmed, you know,
that that is --

10 THE COURT: All right. I just want
to keep that moving along.

Okay. So as I recall, I think there
were actually about four issues that were
outstanding about the jury instructions, and here
15 is what I think about them.

In terms of the punitive damages for
the fraud claim, that's not going to the jury.

There's basically, I agree with what
Mr. Rovner said, the letter was a question of
20 fact and whether or not somebody is a managing
21 agent, but you've got to put in enough evidence
22 from which someone could actually draw that
23 conclusion, and what was shown during the
24 plaintiff's case gave essentially no insight at

all as to how things actually worked at Cisco and what authority Mr. Hernandez had, and I think the case that Mr. Blumenfeld cited, robe BEE versus McKesson corporation, 47 Cal, 4686, 2009, says, when talking about a managing agent, that it's talking about people that have, it says discretionary authority over corporate policy, it's talking about formal policies that affect the substantial portion of the company and that are the type likely to come to the attention of corporate leadership.

There's just no showing that Mr. Hernandez was that sort of person, and so therefore I'm not going to let that go to the jury.

In terms of willfulness, I was aware, but I did appreciate having cited the recent Federal Circuit case that I think does stand for the proposition that ultimately I have to decide the objective part of the willfulness test.

And basically, based on everything that has been put into evidence in this case in terms of the accused products, there is not clear

and convincing evidence that Cisco acted despite a high likelihood that its actions infringe a valid or enforceable patent.

I don't think -- I think that applies to both patents, and I also think that that if the jury got to the subjective part of the test, that there's no evidence -- there's not sufficient evidence in the record to let any reasonable jury to find that Cisco actually knew or should have known that its actions constituted an unjustifiably high risk of infringement as to the validity of an enforceability patent, so I'm not going to let that go to the jury.

In terms of method claims, I will grant judgment for Cisco against XpertUniverse of noninfringement on the claims that were in the case when the trial began, as stated in the pretrial order.

And at some later time, Cisco can submit some form, a part of judgment or something, but clearly they were in the case until XpertUniverse made the decision, you know, circumstances are on the record not to go forward with testimony on those. And so I think there is

a failure of proof, and so I'm going to grant judgment on those.

And on the invalidity claims, I don't think that any -- that the jury could find either anticipation or obviousness on any of the claims other than claim 5 or claim 12, so I'm not going to let that go to the jury either.

And I think that that resolved the various issues that are outstanding in terms of what's going to the jury, and I trust that people who are working on the jury instructions behind the scenes will start making the changes to reflect that.

I guess one other thing is, there is not much time left. I don't know. Did the parties gets what the current status of the timekeeping is?

MR. CANTINE: We did, your Honor.

THE COURT: And XpertUniverse's has husbanded its time a little bit better, so you actually have 30 extra minutes over what Cisco has. And so I just want to make sure you're aware of what the time situation is.

So I will try to look at the jury

instructions. I did notice when I was looking at them last night, there were a couple places where there were sort of conforming changes that I had overlooked, partly because I had actually decided how I was going to rule on some of these things yet.

But I'm hopeful that there's somebody on each side who can actually start proofreading the jury instructions while we're having testimony this morning so that those kind of things can be taught and resolved without a whole lot of effort.

Anything else?

MR. CANTINE: Just on the punitives, your Honor, I just want to make sure. We think whether Mr. Hernandez is a managing agent is a question of fact that the jury should decide. My concern is what happens if the appellate court says you got it wrong and we have to come back and do it all over again. The jury is here.

They heard all the evidence. Why not let them decide it. Then we can decide it post-trial. It just seems like a safer approach.

We're going to have to come back and

do it all over again if the appellate court says
you've got it wrong.

THE COURT: Well, you know, I can't
say there isn't some attractiveness to that sort
5 of proposition.

MR. CANTINE: If they come back with
nothing, then no harm, no foul.

THE COURT: And I guess what I'd say
is, when I have a doubt, I will do what you
10 asked, but, you know, this probably isn't going
to sound very good. But I just think it would be
wrong to send this to the jury.

MR. CANTINE: I mean -- I understand
your --

15 THE COURT: What you say is a
reasonable suggestion, but, you know, but I don't
think it's the -- I don't think it's the right
thing to do here.

MR. CANTINE: All right. I just
20 want to make sure our objection is on the record.

21 Thank you.

22 THE COURT: Thank you, Mr. Cantine.

23 All right. Anything else?

24 MR. ROVNER: Your Honor, I just

Wanted to hand up the proposed order on claim
construction that you had asked for.

THE COURT: Oh, yes. Thank you.

All right. So if you can take the word proposed
5 out of it.

MR. ROVNER: Yes, your Honor. It
was proposed until you said it was not proposed.

THE COURT: Yes, yes. You know, I
spend a lot of times crossing out the word
10 "proposed" on things. I think it would be easier
if you just to submit it and say, this is the
order we'd like.

If there's no objection from Cisco,
which I assume there probably isn't going to be,
15 if we can just get that word "proposed" deleted,
because it would look better.

MR. ROVNER: That's fine. We'll get
copies when we need it.

THE COURT: All right. Thank you
20 for taking care of that, Mr. Rovner.

21 Anything else? All right. We'll
22 take a couple-minute break. Okay?

23 (Short recess taken.)

THE CLERK: All rise.

THE COURT: All right. Please be
seated.

We're ready to bring the jury in;
5 right? All right.

Please bring in the jury.

(Jury entering the courtroom at 9:37
a.m.)

THE COURT: Good morning, ladies and
10 gentlemen. I believe we're ready to proceed.

Mr. Schuman.

MR. SCHUMAN: Thank you, Your Honor,
good morning.

Cisco calls Mike Wagner.

15 THE COURT: All right.

THE CLERK: Good morning, sir. Do
you want to swear or affirm?

THE WITNESS: Swear.

THE CLERK: Please state and spell
20 your full name for the record.

21 THE WITNESS: Michael Joseph Wagner.
22 Last name spelled W-A-G-N-E-R.

23 THE CLERK: Please place your left
24 hand on the Bible and raise your right hand.

Do you solemnly swear that the
testimony you are about to give to the Court and
the jury in the case now pending will be the
truth, the whole truth and nothing but the truth,
5 so help you God?

THE WITNESS: I do.

MICHAEL JOSEPH WAGNER,
the witness herein, having first
been duly sworn on oath, was examined and
10 testified as follows:

THE COURT: Mr. Schuman. Mr.
Damsgaard.

MR. DAMSGAARD: Sometimes I wish I
were Mr. Schuman, Your Honor.

15 DIRECT EXAMINATION
BY MR. DAMSGAARD:

Q. Good morning, sir.

A. Good morning, Mr. Damsgaard.

Q. Would you please tell us your name and
20 occupation?

21 A. Michael Joseph Wagner. I'm a management
22 consultant that specializes in valuation of
23 intellectual property.

24 Q. And what was your assignment in this case?

A. To address the damages issues if the jury finds liability either on the patent infringement claim or the fraudulent concealment claim.

Q. Can you tell us your educational background?

A. I have a Bachelor of Science in engineering, which I received from Santa Clara University in 1969. I have a Master's in business administration, which I received from UCLA in 1971.

And I have a Jurist Doctorate degree from Loyola University, School of Law in Los Angeles in 1975.

Q. What's your work history?

A. I've been doing what I'm doing today for 36 years and I've worked with four firms during that time period. The firm I was with the longest and where I started my career was Pricewaterhouse, which at that time was one of the big eight accounting firms where I became a CPA as well.

And I was in their management consulting department. The last seven and a half years, I was a partner in that firm.

Then I joined a firm called Putnam
Hayes & Bartlett, which is a Boston,
Massachusetts based consulting firm formed by
three Harvard business professors. I was with
5 them for ten years as a managing director.

I then joined Charles River
Associates, another Boston-based consulting firm
that -- actually it's publicly traded as it has
over 600 professionals. I was a managing
10 director of that firm for seven years.

And most recently, I'm with a small
firm in Silicon Valley called Economics
Incorporated. And I'm doing the same work I've
been doing for the last 36 years with them.

15 Q. Thank you. Tell the jury what
professional licenses or certifications you have
or have had.

A. Currently I am an active license as a
certified public accountant in the State of
20 California. Formally I was also a CPA in the
21 states of Oregon, Washington and Hawaii.

22 I'm a certified management
23 consultant. I also have Certificate Number 23,
24 which is a certificate in financial forensics by

the American Institute of Public Accountants.

Now, there's over 5,000 CPAs that hold that credential. My credential is so low because I was on the Inaugural Committee.

5 I was asked to help form the standards in order to get that type of credential from the NAIPA.

I'm also a licensed attorney in the State of California.

10 Q. Have you written any books in your area of expertise?

A. I have. I have contributions to three books.

15 One, which is the Litigation Services Handbook. I was approached by the publisher to write the book.

I became the founding editor of that book, and it is now in its Fifth Edition. It's been in existence for over 20 years.

20 It's considered one of the leading books in my area of expertise, which is financial analysis in matters that are in dispute. I also wrote two chapters of two valuation books.

24 Q. When you say valuations, you are talking

about business valuations?

A. Business valuation books. And then beyond that, I have 26 other articles I've written for professional journals.

5 Q. Has the Litigation Services Handbook gained any special recognition?

A. It has. The Federal Judicial Center, which is an organization that helps make the Judicial Center or the system better in the
10 United States has a publication called Treatise on Scientific Evidence. It's guidance to federal judges as to how to treat scientific evidence in the courtroom.

There is a chapter on economic
15 damages. And in that chapter, there's a bibliography for further resources to a federal judge. My one book is one of only five references in that chapter.

Q. Have you done any lecturing or teaching?

20 A. Yes. Over my career, I've frequently
21 taught in the area of how to calculate damages on
22 a commercial basis to both CPAs and financial
23 experts and also attorneys around the country.

24 Q. Have you been qualified and testified as

an expert witness in any lawsuits?

A. Yes. Prior to this trial, I've testified as an expert witness 128 times. Thirty-one times in patent infringement matters.

5 Q. When you've testified, have you been on behalf of the plaintiff or on behalf of the defendant?

A. Both. And it's fairly evenly split.

10 Either I'm calculating damages for a plaintiff in a case or responding to a plaintiff's damage claim for the defendant.

MR. DAMSGAARD: Your Honor, we would tender Mr. Wagner as an expert in business valuation, financial analysis and commercial and patent damages.

MR. CANTINE: No objection.

THE COURT: All right. You may proceed.

MR. DAMSGAARD: Thank you.

20 BY MR. DAMSGAARD:

21 Q. Mr. Wagner, let's consider the claim by
22 XpertUniverse against Cisco for fraudulent
23 concealment. Have you formed an opinion
24 regarding damages with respect to the fraudulent

concealment action?

A. Yes.

Q. What is that opinion?

A. That I do not believe that XpertUniverse
5 has proven there's any damages for the alleged
fraudulent concealment and --

MR. CANTINE: Objection, Your Honor.

THE COURT: I'm going to strike that
answer.

10 And Mr. Damsgaard, ask him a
different question, so you get a different
answer.

MR. DAMSGAARD: Sure.

THE COURT: Members of the Jury,
15 ignore what he started to say there.

BY MR. DAMSGAARD:

Q. Have you seen any evidence of harm or
damage in the work you've done?

A. No.

20 Q. So, is your damage number zero?

21 A. For that alleged claim, yes.

22 Q. And why do you say that?

23 A. That my job is -- as a damage expert is to
24 determine what would have happened but for the

alleged fraudulent concealment and to see if the financial condition of XpertUniverse would be any different than it actually was. And based on the evidence that I've seen, I don't think it would be any different.

And the major reason for that is that at that period of time when the alleged concealment was supposed to have occurred between April of 2006 and January of 2007, XpertUniverse was not able to develop a product. They had no customers.

MR. CANTINE: Objection, Your Honor. He's talking to causation.

THE COURT: I'm going to sustain the objection, but you can ask a question a slightly different way.

BY MR. DAMSGAARD:

Q. Okay. Mr. Wagner, when you looked at the valuation of the company at the time, how does that play into your opinion that the damages would be zero?

A. Well, first off, I've seen no valuation of the company at that time that is presented as evidence in this case. So that doesn't give me

any information as to what the value of the
company was in April of 2006.

Q. So what factors have you looked at to make
that determination?

5 A. Well, some of the factors I looked at were
the documents that Mr. Bratic used to come up
with his opinion.

Q. You were going to mention some of the
factors about no products, no sales, those types
10 of things that you were about to testify to that
go into the valuation that you're presenting
here.

MR. CANTINE: Objection, Your Honor.
Leading.

15 THE COURT: I'm not going to sustain
that. Go with a follow-up question that's not
leading. I think that's just introductory.

THE WITNESS: Yes. The value of the
company is based on what is happening at the
20 company, what the opportunities are in the

21 marketplace and how it's able to execute in the
22 marketplace.

23 BY MR. DAMSGAARD:

24 Q. And what is your view on what that is?

A. Well, what I saw, based on the evidence, is that there was no product that was developed by this company. They were trying to develop a software product, that it was not going well.

5 That there were cash flow problems before the alleged concealment occurred. They're laying off the developers they needed to finish the work before the alleged concealment occurred.

10 That the development they're doing was based on public source software, which is not the way you want to design a product if you want to have protection going forward from others copying your work.

15 There was apparently mismanagement problems within the company. And I don't see that this company is going to be successful regardless of any alleged concealment.

20 Also, what you really have to calculate is the difference this company's worth, whether in the SolutionsPlus program at Cisco or

21 the Technology Developer Program. They were
22 still offered and was in a program at Cisco.

23 And I've seen no evidence that
24 there's any difference in value between those two

programs to a developer.

Q. Have you reviewed the work or testimony of XpertUniverse's damage expert in this case, Mr. Walter Bratic?

5 A. I read his report. I read his deposition.

And although I was not here, I read the transcript from Monday's trial as to his trial testimony for the jury.

Q. Do you agree with Mr. Bratic's opinion
10 that were expressed in this courtroom?

A. I don't agree with either of his calculation for damages for patent infringement or his damages for alleged concealment.

Q. With respect to his alleged damages for
15 the fraudulent concealment claim, what is your disagreement with Mr. Bratic?

A. The only two piece of information he used to inform his opinion was a February 7th, 2005 report by Standard & Poor's and an October 2006
20 report by Dr. Duff & Phelps. I don't believe
21 either of those documents provide sufficient
22 evidence to arrive at a value of Xpert Universe
23 in April of 2006.

24 Q. Okay. Let's focus, first, on the February

2005 market assessment of S & P. What's the basis for your belief that that isn't a reliable indicator of damages?

A. Well, first off, your question was improper. It wasn't October of 2005. It was February 7th, 2005.

Q. Thank you for correcting me.

A. There's two main reasons. First, it is -- it was just a preliminary draft for discussion purposes only. It was not a finalized document.

Second, it was in no way a business valuation. In fact, in the document there was actually no projections of income costs, any success. There was nothing that makes it anything like a business valuation.

And then the third reason, it's 15 months before the date that Mr. Bratic should be trying to determine the value of XpertUniverse. And if you believe their case, nine months can make all the difference in the world to a

company.

Fifteen months in a technology company, particularly a start-up company, is going to dramatically change in value. And based

on all the problems they experienced between February 2005 and April 2006, the company clearly is not being measured properly by using valuation 15 months earlier.

5 It's like the analogy that Mr. Bratic gave you to explain valuation that as a particular date, a house may have a certain value. But if after that, something happens like building train tracks next to it decreases the
10 value.

 The same thing happened here in this case. And he did not take any of those factors into consideration in his work.

Q. You mentioned that it was a preliminary
15 draft. What's the significance to you of the fact that the document was a preliminary draft?

A. That they haven't completed their work. And as they state in their documents, if they complete their work, their opinions or what they
20 say may be materially different than what's in
21 the preliminary draft.

Q. Let's turn to the second document, the
22 Duff & Phelps October 2006 document. Why do you
23 believe that document is not a reliable indicator
24

of damages?

A. Well, again, it's a preliminary draft for discussion purposes. It doesn't even have a date to it.

5 It just says October, 2006. They haven't even finalized the date of when that document's prepared.

It was for internal planning purposes only. There are restrictions of letting
10 XpertUniverse show this to any third party without the written permission of Duff & Phelps.

They knew this wasn't work that was completed and they didn't want their name associated with anyone else other than the person
15 who was paying for the work. So clearly this is not something they would stand up and say, This is the value of the company.

Q. And why would you say that it's not a business valuation?

20 A. Well, again, this document had a little more information like a business valuation than
21 the Standard & Poor's analysis, which was just a
22 market opportunity assessment. This did have
23 three approaches that are used to value a
24

company, but it was not a complete valuating by
an independent party.

The crucial information in the
document that came up, all of their indications
5 of value was internal projections done by
XpertUniverse management, which was not tested in
any way by Duff & Phelps.

Q. Now, let's talk a little bit about
management projections. Did they play a role in
10 the Duff & Phelps' document?

A. They were the foundation of all of the
valuation methods. This is a projection from
2006 around the date of the document out through
2010, five years later. It's actually what the
15 company would look like in 2010 is what is the
basis for all of the additional work in the
report.

Q. Just so we're clear, can you just explain
exactly what you mean by management projections?

20 A. Management projections, what they did is
21 they didn't forecast the total picture of the
22 company. They forecasted a very limited, what I
23 will call, income statement. They forecasted the
24 revenues, their costs and what I would call

modified cash flow. It wasn't complete cash flow.

But they didn't model the balance sheets. They don't model cash flow statements or statements of stockholders equity, what a financial picture would look like.

Q. Where did the projections come from?

A. They just came from internal management at XpertUniverse. I don't know.

I have not seen what the basis for the projections were. There's no information in this document that explains that.

Q. Did you determine whether or not Duff & Phelps had done anything to validate its management projections?

A. Well, just looking at the four corners of the document, there's no indication that they did anything except for just accept these projections. And they even stated that these are management projections. And if management cannot achieve these projections, the value they indicated would be very different than what is reflected in the document.

Q. Having looked through the testimony and

work of Mr. Bratic, did he verify any of the assumptions in the report?

A. He did, but not the crucial ones.

Q. What do you mean by that?

5 A. Well, again, the foundation for this whole analysis is these projections, this five-year projection. What Mr. Bratic did was then from those projections, Duff & Phelps went out to public sources to get yardsticks, multiples of
10 the revenues that was reflected to come up with a value.

He tested to make sure that when Duff & Phelps collected information about Cisco, which was one of the comparable companies, that
15 they properly recorded the right revenue number and the market capitalization.

So he verified what I would say is the peripheral parts of the document, but not the key parts.

20 Q. Why are the management projections so key to the analysis?

21 A. Because it's a house of cards. If that
22 crumbles, if that's not right, the value is going
23 to change dramatically even if the multiples
24

don't change.

Q. Did we prepare a demonstrative to sort of visualize this a little bit?

A. You did.

5 Q. Can you explain to the jury what that visualization is?

A. Well, the left-hand side is a picture of a house and the foundation of these management projections. And then the work -- that work,
10 Duff & Phelps are all the X's above. They're multiples using transactions in the marketplace, which they believed by using comparable companies or just capitalization multiples based on a publicly-traded company.

15 But those X's, if you have no foundation, it's going to crumble. It means nothing.

And that's the right-hand side.

Q. Now, have you seen any evidence that
20 indicates to you that there was a probability
21 that XU would not achieve its management
22 projections set forth in the document?

23 A. Yes.

24 Q. And what is that?

A. Well, again, if you look at their history of their lack of success of developing a product after seven years of effort. Spending much money which seemed to have not been fruitful. Cash
5 flow problems every month. Laying off their work force.

Clearly not meeting their timing for the development effort tells me they're not going to meet some projection on sales and customers
10 where they've never done anything in that area. So I would not blindly accept those as realistic projections.

Q. Did you see any indication that Duff & Phelps was made aware of the operational and the
15 financial issues that were occurring at XpertUniverse?

A. There's no discussion of that type of information I've just described in their report.

Q. Was there anything in the Duff & Phelps'
20 report which indicated that Duff & Phelps assessed the value of XpertUniverse's technology?

A. No, nothing.

Q. Did you see any more technical problems,
23 for lack of a better word, with the Duff & Phelps
24

analysis?

A. Even though Duff & Phelps is a well-known valuation firm, not all their work is perfect. And there are some significant technical problems, even the work they did on those multiples.

Q. And what were some of the things that you identified as --

A. Well, I won't go through all of them. Some of the significant ones are the discount rate.

I told you that actually the foundation basis for all these valuations isn't what was happening in the company in 2006. It's what they projected happening five years later in 2010.

When you calculate value in the future to figure out what it is worth today, you have to discount that back to what the present value, using an appropriate risk, adjusted discount rate to reflect whether that projection is going to happen or not.

The discount rates that Duff & Phelps used are really discount rates were more

what I would call second seed financing companies that already have a product. They're starting to be successful and you need more money to grow the company.

5 This is a start-up company. Even though it's been in existence for seven years, they don't even have a product yet.

 In discount rates for that type of company are what's called venture capitalist
10 rate, and it's more than double what was used in this projection. So that dramatically overstated the value that they had.

 Another problem they had is that all these yardsticks they used were large publicly
15 traded companies, companies like Cisco. Many of the companies were billion-dollar-a-year-in-sales companies. Publicly traded on the stock exchanges.

 You have to make two types of
20 adjustments if you use that as a yardstick for a
21 small privately-held company who has zero
22 revenues. And those are -- if you invest in
23 Cisco, you can get in and out of that investment
24 immediately by just telling your broker to sell

their stock.

If you invest in XpertUniverse, it's not liquids. There's no market for coming to buy your ownership in that company. So there has to be a discount reflected. Duff & Phelps did not discount in their analysis.

And, also, large companies that are diversified that have all kinds of products, they're less risky. So there's also a discount if you're consolidating your risk in one small area of technology versus a broad range of technology. And there's no discount for that either in this report.

Q. If XpertUniverse actually had value, what would you expect to occur after Cisco decided not to go forward with the SolutionsPlus?

A. If XpertUniverse had really valuable technology, which they had been spending seven years developing, then Cisco is not a monopolist. They're not the only player in this marketplace.

There are other very large successful companies that are trying to be in this space and compete in the space.

If there's really valuable

Technology, they would have picked it up, but now
someone would have licensed XpertUniverse's
patents, someone would try to buy the technology
from them. Someone would have picked up a
5 partnership agreement and said, for a few million
dollars, you can accord it to my product and
there's this huge revenue, billions of dollars of
revenue opportunity, someone would have done it.

The market has spoken. No one has
10 done that up until today.

Q. You have seen the letter that Mr.
Hernandez sent to XpertUniverse in January of
2007?

A. I did.

15 Q. And that's where he advised XpertUniverse
that he wasn't going to proceed with the
SolutionsPlus, but they would be willing to
proceed with the developer technology partnership
agreement?

20 A. That's what that document said.

21 Q. Do you have a view on whether the evidence
22 shows that one program from an economic point of
23 view would be better or worse for XpertUniverse?

24 A. The only evidence that I've seen is the

testimony of Mr. Hernandez, that some companies actually do better than the technology developer program, because it's co-marketed.

The company who has the technology also helps the marketing for that product and someone who really developed the product often are the best people to sell it. So that's still a wonderful program and many companies take part in that program at Cisco. Very few actually do the SolutionsPlus program.

Q. Thank you.

Let's turn very briefly to the other claim that's asserted against Cisco in this case, and that would be the patent claim.

Do you have an opinion with respect to damages for that claim?

A. I do.

Q. What is it?

A. Assuming that the jury finds that the patents are valid and infringed, that I believe the reasonable royalty rate should be a rate for each of the patents-in-suit. And the reason I say that is that there shouldn't really be just one hypothetical negotiation. There really

should be two.

These patents have nothing to do with each other. They are not in the same family. They teach very different things.

5 They're actually executed in different products at Cisco, so I think if you decide to award the royalty rate, you should have a separate royalty rate for the '709 patent and a different royalty rate for the '903 patent.

10 Q. Do you have an opinion as to what those royalty rates should be?

A. I do. And I think the royalty rate for the '709 patent should be two-and-a-half percent, and the royalty rate for the '903 patent should
15 be three percent.

Q. And what's your basis for that opinion and selecting those royalty rates?

A. Well, actually, Mr. Bratic and I did very a similar analysis and actually there's in
20 agreement here. I think the starting point used

21 was appropriate, the Teletech Aspen license
22 agreement.

23 And then I did the Georgia-Pacific
24 analysis, but came to very different conclusions

on a number of them. And the biggest one probably is GP factor number three, the nature and scope of the license.

The Teletech agreement was what's called a naked patent license, no other rights. It actually gave more patents, ten, than what's at issue here, two, but also gave finished product software to Aspen.

So clearly that has more value than just getting ideas of how to do something, and you have to execute and develop your own software.

So there's a lot more value in my starting point than what is going to be the hypothetical license here. So that is a downward impact from the five-percent starting rate.

I also found Factor 7, 8, 9, 10, 11 and 12 also go down, the first one being GP Factor No. 8, because that looks at the commercial success and the profitability of the product incorporating the invention, and here Cisco did not do well with this product.

After three years of effort, they sold a total of \$900,000 of product that practice

these claims, and they lost a lot of money doing so. So, again, it's not a vehicle where they're earning lots of profits which they can share with XpertUniverse.

5 Q. Okay. We'll put the slide up.

Applying the royalty rates that you had, which was two-and-a-half percent and three percent, what is your damage figure for the patent claim?

10 A. Well, my number of royalty rate is different than Mr. Bratic's because I told you, the Pulse product is only practiced by the '709 patent. The RemoteXpert product is only apparently accused of infringing the '903 patent.
15 But Expert Advisor infringes both. So actually, I think it's additive.

In my world, the rate for Expert Advisor is actually higher than Mr. Bratic's. Five-and-a-half percent because you add the two
20 together. But if you look at the mat events separately I have a royalty base of \$618,531 for
21 the '709 patent.
22

23 Q. And that's the sales of the accused
24 product?

A. That's the total sales of the accused product. Multiplying that by my two-and-a-half percent royalty rate would be damages of \$15,463.

For the '903 patent, the royalty
5 base is \$680,215. Applying a three percent royalty rate to that, it gives \$20,406.

MR. DAMSGAARD: Thank you,
Mr. Wagner. I have no further questions.

THE COURT: Mr. Cantine?

10 CROSS-EXAMINATION

BY MR. CANTINE:

Q. Good morning, Mr. Wagner. How are you?

A. Good morning, Mr. Cantine. I'm fine. I
hope you are well. I know you're tired.

15 Q. Well, not too bad.

Let's see if we can clear up a
couple things.

So if I understand your testimony,
the damages for fraud are zero?

20 A. Correct.

21 Q. In your opinion. And you agree, I
22 believe, with Mr. Bratic, the way to measure
23 damages for a fraud claim is you take the value
24 of the company before the fraud and the value of

the company after the fraud, and you calculate the difference?

A. Yes, as long as you take into consideration other things that impact the value besides the alleged legal violation.

Q. Okay. So but we can call that the but-for value?

A. We can.

Q. Or but-for damages?

A. Yes.

Q. Okay. And so is it your opinion, then, that in April of 2006, XpertUniverse had no value?

A. They may have had some value, but I don't know what that is.

Q. You didn't calculate that?

A. No.

Q. But you say they had, at some point, no value?

A. Well, no value -- their value didn't change as a result of the alleged legal violation. At some time they have no value, they went out of business, but that was due to other factors.

Q. Okay?

A. And even then they still had some value if these patents had any value.

Q. So did they have value before April 2006?

5 A. They probably had some value.

Q. But you don't know what the number is?

A. No.

Q. But you looked at the S&P, what do you want to call it, a valuation, a document, a report?

10

A. What it's actually called, a market opportunity assessment.

Q. Okay. You reviewed that in detail?

A. I did.

15 Q. What did S&P say was the market value opportunity for XpertUniverse in 2005?

A. I think that they had a range of 110 to 225 million based on certain market segments.

MR. DAMSGAARD: Objection.

20 THE COURT: I'm going to overrule that.

21

22 BY MR. CANTINE:

23 Q. And you reviewed that document detail?

24 MR. DAMSGAARD: A limiting

instruction?

MR. CANTINE: The limited instruction, your Honor, was for our expert when he was relying on it.

5 THE COURT: That's not actually the point.

Members of the Jury, you recall that when there was testimony during Mr. Bratic's, or when Mr. Bratic testified, and the same rules apply here, that there's some evidence that is admissible for a limited purpose. And so the limited purpose here, whether it's for Mr. Bratic or for Mr. Wagner, is to evaluate their opinions. But the purpose you cannot use it for is to establish the value of XpertUniverse at the time.

You may proceed.

MR. CANTINE: Thank you, your Honor.

BY MR. CANTINE:

Q. So the S&P valuation was between 110 and 20 225 million. Is that what you said?

21 MR. DAMSGAARD: Okay.

22 THE COURT: Mr. Cantine, can we have
23 a sidebar, please.

24 (Sidebar conference held out of the

hearing of the jury as follows.)

THE COURT: You mentioned the number
once. You already did. Don't mention it again.
All right?

5 MR. CANTINE: Can I do the Duff &
Phelps one?

THE COURT: You can do it once.

MR. CANTINE: Thank you.

(End of sidebar conference.)

10 BY MR. CANTINE:

Q. Sorry. All right. So you looked at is
the S&P valuation. You had some criticisms of
it?

A. You keep calling it a valuation. It was
15 not a valuation. I did look at that document.

Q. Okay. And we had this discussion at your
deposition; right? I'm trying to make sure I put
the right label on it so we can get past that.

A. We did talk about this in my deposition.

20 Q. The other one you considered was the Duff
21 & Phelps business valuation?

22 A. Indication of value range, or indicated
23 value range.

24 Q. Let me write that down.

Okay. So you considered the indicated Duff & Phelps value range as part of your analysis in this case?

A. Yes, to understand and to comment upon Mr. Bratic's work.

Q. And that one was from 2006; is that right?

A. October of 2006.

Q. October of 2006. And what did Duff & Phelps find as the indicated value range of XpertUniverse in October 2006?

A. The numbers they reported were between 70 and 100 million.

THE COURT: And, Members of the Jury, again, the testimony here that you just heard is offered for the limited purpose of evaluating Mr. Wagner's testimony and it's not offered for the purpose, you can't use it for the purpose to determine XpertUniverse's value at a particular point in time.

MR. CANTINE: Thank you, your Honor.

BY MR. CANTINE:

Q. Now, I think you testified in your direct that in April 2006, XpertUniverse had other opportunities; right?

A. They clearly did.

Q. And I just want to make sure I'm clear.

Was it your understanding that XpertUniverse was
a member of the technology developer program or
not?

A. Based on the documents I've seen, the
answer is yes, they had a signed agreement with
Cisco at that point in time.

Q. And you understand they had to have a
finished product to be part of that program;
right?

A. Well, not to be part of the program. To
be actually executing under the program. You can
be part of a program and not doing anything.

Q. Well --

A. Yes, that's true.

Q. Mr. Hernandez was here. Did you read his
testimony? He was here yesterday.

A. I didn't read it. I was here. I heard
it.

Q. He said you had to have a product to be in
that program, didn't he?

A. I think he fault vehemently they were
still a part of the program. He said yes, for us

to sell it, we can't sell vapor wear. You have to give us the product and we'll go out and sell it.

Q. Is it your opinion that XpertUniverse had nothing but vaporware?

A. Based on what I've heard in this record, yes, they had no finished product.

Q. Is that how you equate finished product equals vaporware?

A. That's the common term used in Silicon Valley.

Q. Really?

A. Yes.

Q. Were you here for Mr. Koepfel's testimony?

A. No.

Q. Do you know who Mr. Koepfel was?

A. I think I was told he had something to do with Citigroup.

Q. He was a senior executive at Citigroup and they did their due diligence on the XpertUniverse technology and they found it wasn't -- did you read that testimony?

A. No. That is inconsistent with them -- why wouldn't they have used it if it wasn't

vaporware?

Q. They actually felt it was a benefit that they didn't have finished product. Did you read that testimony?

5 A. I think that I that understood they wanted customized to them, which would be to their benefit and not the benefit of XpertUniverse, because they then they would have to go out develop a custom product for everyone else.

10 Q. I didn't ask you if you it was a benefit for XpertUniverse. I said Citibank found that it was a benefit that defendant's product was not finished. That's what Mr. Koeppel told this jury.

15 A. That's true, and I apologize for my answer.

Q. And did you consider Ms. Eiss' testimony and Mr. Steinhoff's testimony that they saw no value to XpertUniverse in being in the technology
20 developer program?

21 A. No.

22 Q. You didn't see that testimony?

23 A. I did not.

24 Q. Now, you were retained as an expert; is

that right?

A. I was.

Q. And you prepared a report?

A. I actually prepared two reports, yes.

5 Q. Well, we're only here to talk about one of
them; right?

A. My 156 report appeared on October 1st,
2012.

Q. You're very good with numbers.

10 A. That's why I'm an accountant.

Q. All right. And it's your goal as an
expert to look for the truth; right?

A. I think that's my role to serve the Court,
yes.

15 Q. And to try to get as much information as
you can in order to make that determination?

A. Yes. As I told you at my deposition, I'm
a fact-based witness. And that's all I can do is
reach opinions based on the facts that I have and
20 I've got all the relevant facts.

21 Q. And you want to keep an open mind as you
22 look at those facts, don't you?

23 A. I do.

24 Q. But you didn't talk to anyone at Cisco

prior to filing your rebuttal report, did you?

A. I did not.

Q. And you didn't interview anyone at XpertUniverse either, did you?

5 A. I don't think you would let me, but, no, I did not.

Q. And you understand that the Governance Council denied XpertUniverse entry into the SolutionsPlus program in April 2006; is that
10 right?

A. That's what I understand.

Q. Now, I know you have some criticisms of the particular Duff & Phelps and S&P documents, it's called. How is that?

15 A. That's fair, and I do.

Q. But you would agree with me that it's standard practice for folks like yourself and Mr. Bratic to rely on those types of reports in forming opinions?

20 A. I agree with that. I have no problem with
21 him actually using that as a basis, or one basis
22 for his opinion.

23 Q. And you recently did that in another case
24 you testified in, the Wellogix case.

Do you remember that?

A. I do and I do.

Q. Thank you. And I think we agreed at the start, that this whole but-for methodology is an
5 accepted practice for folks like yourself and Mr. Wagner, I'm sorry, Mr. Bratic?

A. It is.

Q. I apologize.

A. No problem.

10 Q. And in that Wellogix case we were talking about, you used an independent valuation report in forming your opinion as to the value of Wellogix in that case; right?

A. I did.

15 Q. And Wellogix was the plaintiff in that case?

A. Yes, under a trade secret claim.

Q. But there's no difference between a trade
secret claim and a fraud claim as it relates to
20 the but-for methodology; is that right?

21 A. As far as methodology, there's no
22 difference.

23 Q. And the valuation that you relied on in
24 that case, much of the information was provided

by management to form the value in that valuation; is that right?

A. That's true.

Q. And that's standard practice, most of these companies like Duff & Phelps and Standard & Poor's have to rely on information provided by management, don't they?

A. I agree with that.

Q. And it would be very unusual, wouldn't it, for them not to rely on information provided by management?

A. That is often a source of important information for them to consider in reaching their conclusions. I agree with that.

Q. Now, I think you testified earlier that, or you said to me today, right, that XpertUniverse didn't have any products or revenues?

A. That's my understanding. Well, revenue from a product. They had consulting revenue.

Q. And is it your opinion that if a company does not have revenues, they have no value?

A. No, that's not my opinion given certain facts.

Q. Is it your opinion that a product, a company that does not have a product has no value?

A. No. Given certain facts, they -- it could be significant value.

Q. And would you agree that sales don't necessarily equal value?

A. I clearly agree with that.

Q. In your rebuttal report, sir, did you do any kind of analysis as to XpertUniverse's cash flows or where XpertUniverse got its money from and what it did with its money?

A. I considered the information. I wouldn't say I analyzed it.

Q. Did you analyze why XpertUniverse was able to raise \$4 million in 2006 from investors?

A. No.

Q. Did you ever ask signals company, anyone from Cisco why they bought five companies for \$312 million in 2004 when none of those companies had any sales?

A. How could I ask that question, other than no when you've already asked me if I talked to anyone at Cisco. No, I did not.

MR. CANTINE: Thank you very much,
sir. I appreciate your time.

THE WITNESS: You're welcome.

BY MR. DAMSGAARD:

5 Q. A couple very quick questions, sir.

Counsel mentioned the Wellogix --

A. Wellogix.

Q. -- Wellogix case. Is that analogous to
this case?

10 A. No. And a very different fact situation
than here.

Q. Secondly, it indicated that some agreement
that the company could have value if it hadn't
yet had sales. What would the circumstances be
15 in such a situation?

A. Well, that's actually very common in
startup companies in technology, is that it takes
them time to develop their product and get it
right and get the market to accept what they've
20 done as value. But what makes those companies
valuable is if there is truly valuable technology
21 that has been developed.

23 Where I come from in Silicon Valley
24 is littered with companies that had great ideas,

that had lots of financial backing. Some of them even refer to market, but then could not execute.

Just because you spend a lot of money does not necessarily mean you'll be successful, but if you have spent a lot of money and you really do have a great idea that you can protect in the marketplace and prove in the marketplace that it has value, there can be significant value on a company that has never had a sale.

Q. And do they do due diligence before they spend money on a company like that?

A. Generally, people do.

Q. And in this circumstance, was that -- that paradigm applied to XpertUniverse?

A. I have not seen the information or evidence that what they actually developed was needed in the marketplace, desired by the marketplace, or anyone would pay good money for it.

Q. And do you understand that they showed this technology to lots and lots of companies for the last eight or nine years?

A. That's my understanding.

Q. And has anybody licensed it, purchased it,
anything like that?

A. Not as of 2013.

Q. In your view, has the market spoken on the
5 value of that technology?

A. That's my judgment.

MR. DAMSGAARD: No further
questions.

THE COURT: All right. Thank you,
10 Mr. Wagner. You may step down.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

MR. SCHUMAN: Your Honor, Cisco
rests.

15 THE COURT: All right. Thank you,
Mr. Schuman.

Mr. Cantine or Mr. Sobel?

MR. CANTINE: Can we have a brief
sidebar, your Honor?

20 THE COURT: Yes.

21 (Sidebar conference held out of the
22 hearing of the jury as follows.)

23 THE COURT: All right. What's up?

24 MR. CANTINE: Just in terms of

directed verdict, I assume you want, not want us
to do it in front of the jury?

THE COURT: No.

MR. CANTINE: I just want to put on
5 the record. I'm sorry. Rule 50. So we're going
to move for Rule 50 motion based on infringement,
validity I think you already got rid of.

MR. SOBEL: No. Validity of claim
five in the '709 patent.

10 MR. CANTINE: The remaining validity
claims. We don't think their expert connected
the dots, let's say. The last time I checked,
motivation to combine doesn't -- making something
crisper does not satisfy the motivation to
15 combine, the relevant case law. And I think we
-- I'm sorry. And public use and on-sale bar. I
don't think they've established, other than
establishing that the source code was in -- was
written, they have not tied it to any product or
20 demonstration that it was on sale or public use.

21 THE COURT: All right. All the
22 invalidity objections I will take under
23 advisement.

24 Did you say you had an infringement

Motion?

MR. CANTINE: They had a
counterclaim on noninfringement.

THE COURT: Just the same thing as
5 your claim of infringement. I'm not going to
grant that.

MR. CANTINE: Okay.

THE COURT: All right?

MR. CANTINE: Thank you.

10 THE COURT: And then I presume,
depending on the verdict, or even not depending
on the verdict, everybody is going to be able to
renew these motions after trial?

MR. CANTINE: I guess we can talk
15 about that later in terms of timing.

THE COURT: Yes. This is not a good
time now.

All right. So you've got Dr.
Nourbakhsh?

20 MR. SOBEL: We have a short read- in
21 of David Rutberg, John Steinhoff and Dr.
22 Nourbakhsh.

23 MR. CANTINE: We told you about
24 Steinhoff.

MR. SCHUMAN: We didn't get any disclosure that you were playing Rutberg. We thought it was Faro and we objected and the Court sustained my objection.

5 MR. CANTINE: My understanding is we told you about Rutberg.

MR. SOBEL: It's a less than a one-minute clip that says that he's not an inventor.

10 THE COURT: Why don't you do this. Why don't you give them the one-minute clip and maybe we won't need to get into whether it was disclosed or not, but give them whatever you have marked and meanwhile call Dr. Nourbakhsh,
15 Mr. Steinhoff.

MR. BLUMENFELD: Your Honor, on the Steinhoff issue, they did send us an e-mail a couple nights ago saying that they might call him in rebuttal, but when we were standing here
20 yesterday afternoon and you asked what they were going to do today, they said they had one
21 deposition and Dr. Nourbakhsh.

23 We assumed they weren't calling Dr.
24 Steinhoff based on -- Mr. Steinhoff, sorry, based

on that statement. So --

MR. CANTINE: I'm sorry if there was
a misunderstanding.

MR. SOBEL: We were just trying to
5 get a --

THE COURT: You know, I was looking
for my own purposes, I was looking more for the
general flow of things. I take it you knew
roughly what you thought at one point. Maybe you
10 stopped as of yesterday. But you knew what,
generally, why he was being called on rebuttal.

MR. BLUMENFELD: No, we were not
told anything about why he was being told on
rebuttal.

15 MR. CANTINE: I'm not so sure we
were obligated to tell him what he was going to
testify about.

THE COURT: Why don't you tell me
right now. What generally is he testifying
20 about?

21 MR. SOBEL: He can testify to the
22 fact that the inventions of the '709 patent were
23 never offered for sale.

24 MR. SCHUMAN: I think he said that.

MR. CANTINE: It's direct rebuttal
to Chatterjee.

THE COURT: Well, I will allow that,
and -- I'm going to allow that.

5 MR. BLUMENFELD: I think he already
said that in their case-in-chief.

MR. SCHUMAN: My point was that was
his testimony during the case-in-chief, so it's
clearly cumulative.

10 MR. CANTINE: It's our time.

THE COURT: Well, I'm going to allow
it because, I mean, it may be -- he could be more
focused now, I think, and normally, that would be
something that would be proper for rebuttal case.
15 So I'm going to allow that.

All right. So give me the Rutberg
transcript. Put Mr. Steinhoff and Dr. Nourbakhsh
on and, if we need to, we can get back to
Mr. Rutberg.

20 (End of side bar conference.)

21 THE COURT: We're going to take a
22 ten-minute break.

23 (The jury was excused for a short
24 recess.)

THE COURT: All right. Why don't
you see, talk to each other about the Rutberg
thing. I will come back in a few minutes and
we'll see where we stand.

5 (Short recess taken.)

- - -

(Proceedings ruled after the short
recess.)

THE COURT: All right. By the way
10 things are going, there's probably an issue about
Mr. Rutberg?

MR. SCHUMAN: No.

THE COURT: Okay. So we're ready to
flow seamlessly to the end of the testimony?

15 MR. SOBEL: I hope so.

THE COURT: All right. Let's get
the jury in.

(The jury entered the courtroom and
took their seats in the box.)

20 THE COURT: All right. Members of
21 the Jury, welcome back. We're ready to proceed.

22 Mr. Sobel?

23 MR. SOBEL: Okay. We call

24 Mr. Steinhoff.

... JOHN STEINHOFF, having been duly sworn as a witness, was examined and testified as follows ...

DIRECT EXAMINATION

5 BY MR. SOBEL:

Q. Could you please re-introduce your to the jury?

A. I am John Steinhoff.

Q. All right. And could you remind everyone
10 about what your role was at XpertUniverse?

A. I was director of technology and architect from October 2001 to about July of 2007.

Q. And you testified earlier at trial that when you arrived at the company, the company was
15 called Homework 911; right?

A. Yes.

Q. Okay. And you also testified, told the jury that you were one of the inventors of the patents-in-suit; is that right?

20 A. Correct.

Q. Okay. Did the Homework 911 platform
21 implement the claimed inventions of the '709 and
22 '903 patents?
23

24 A. No.

Q. And how do you know that?

A. Well, we developed it, but also there was no need for the patents at that time, or the subject of the patents. The problem definition process in Homework 911 was really very simple.

Q. Were you involved in any demonstrations of XpertUniverse's technology that it was developing --

A. I was involved, yes.

Q. Okay. What was your involvement?

A. Primarily the role that I had was just to make sure the environment was up and solid.

Q. The demo environment?

A. The demo environment.

Q. Okay. And could you explain the demo environment and how it's created in 2003?

A. Sure. Shortly after we switched from being focused on a -- a homework help service out to kids to a corporate environment, where we were trying to provide an expert location

collaboration-type one, we did, we took the existing technology.

We did what we called a facelift, to make it look like a corporate environment as

opposed to something designed for kids.

And we then took that environment,
copied it over into a separate standalone
environment just for use in demos, so that we had
5 a solid for demos.

Q. And did that demo environment contain the
inventions of the '709 and '903 patents?

A. No.

Q. Was the intention of the demo environment
10 at that time to demonstrate the invention
described in the patents?

A. No.

Q. What was the intention of the demo
environment in 2003?

15 A. The focus was on showing people what a
collaboration environment would look like, what
an interaction with an expert would look like.

So it was -- it was very much
focused on getting into a session with an expert
20 and seeing how that interaction would work using
21 all the different tools.

22 Q. Did the demos explain how the software
23 worked?

24 A. Not really. It was really more a matter

of trying to give people a sense of what we were talking about when we sat through a collaboration environment with an expert, how that would look, how that would feel, give them a sense of how they might use it in their business.

Q. And in 2004 and 2005, did the demo environment that XpertUniverse used change?

A. We tried to keep it frozen in place, so that it didn't get disrupted, didn't break, but we did make one major change toward the end of 2004, 2005, to incorporate use of a tool from IBM called Web Seer, that it basically -- applications existed within a Web Seer environment, so the interface looked different, but it was really the same demo system under covers, but it existed within this Web Seer environment. So we did create that. That was a -- a change.

Q. And in any of the changes that you just described, did the demo environment implement the inventions of the patents?

A. No.

Q. Did the demo environment at any time during the period 2002 to 2005 ever contain code

to support the inventions of the patents?

A. No.

Q. Okay. Was any other demo environment used for demos?

5 A. Not to my knowledge, no.

Q. Okay. And you had knowledge also of the integration that XpertUniverse was doing to integrate the Cisco router into its XpertSHARE platform; is that right?

10 A. Yes.

Q. Okay. Did XU complete that integration work?

MR. BLUMENFELD: Objection, your Honor.

15 THE COURT: Sustained.

MR. SOBEL: Thank you, Mr. Steinhoff.

THE COURT: Mr. Steinhoff, wait a second.

20 THE WITNESS: Oh, I'm sorry. Of

21 course.

22 CROSS-EXAMINATION

23 BY MR. BLUMENFELD:

24 Q. Mr. Steinhoff, are you aware that your

testimony about whether the inventions of your patent were used in XpertUniverse's platform is contrary to the testimony of two of your co-inventors?

5 A. I did not say that the contents of the -- of the patents were not in any version. I said they weren't in the demo version. It was a separate environment.

10 Q. So you're not saying that they weren't used in XpertUniverse products, but only in the demo versions of those products; is that correct?

15 A. I'm saying that we had working -- we were working on versions of the system actively in development, continually. We separated off a demo version of the system that we did not touch, but that we were actively developing code in other environments. And we were, in fact, trying to connect.

20 Q. You were trying to sell the actual versions, not the demos; is that correct?

21 A. As far as I know, we didn't have a --
22 well, we did not have a final version that we
23 could go out and market as a finished product.

24 MR. BLUMENFELD: Thank you.

MR. SOBEL: No questions.

THE COURT: All right.

Mr. Steinhoff, you may step down now. Thank you.

THE WITNESS: Okay.

5 (Witness excused.)

MR. SOBEL: Now we have a very brief
video clip of the deposition testimony of David
Rutberg.

THE COURT: All right.

10 (Videotaped deposition of David
Rutberg was played as follows.)

Q. And you've reviewed the two patents being
asserted against Cisco in this action; is that
correct?

15 A. Correct.

Q. And do you feel that you're an inventor of
either of those patents?

A. No.

(Videotape stopped.)

20 MR. CANTINE: Sorry. Slight

21 technical difficulty. We're going to try that

22 one again.

23 THE COURT: All right. Not a

24 problem.

(Videotape resumed.)

Q. Now, you've reviewed the two patents being asserted against Cisco in this action; correct?

A. Correct.

5 Q. And do you feel that you're an inventor on either of those patents?

A. No.

(End of videotaped excerpt.)

MR. SOBEL: And now we have -- we'd
10 like to call Dr. Nourbakhsh.

THE COURT: All right.

... PROFESSOR NOURBAKSH, having been duly sworn as a witness, was examined and testified further as follows...

15 THE COURT: Dr. Nourbakhsh, you may take the stand. Since you were already sworn once in this case, you remain sworn for this testimony.

THE WITNESS: I understand, your
20 Honor.

21 DIRECT EXAMINATION

22 BY MR. SOBEL:

23 Q. Good morning, Professor Nourbaksh.

24 A. Good morning.

Q. You were here yesterday when Drs.

Chatterjee and Forrest talked about their
opinions on, well, actually, Dr. Chatterjee on
his opinions about source code he reviewed and
5 Dr. Forrest's opinions on validity of the
patents; is that correct?

A. Yes, I was here.

Q. Okay. So let's talk about Dr.

Chatterjee's opinions on source code and the '903
10 patent. He was trying to suggest that the source
code that he reviewed, you know, showed the part
of the claimed invention.

Could we go to D of that. Okay.

And could you explain the issues for
15 the jury here about what was wrong with Dr.
Chatterjee's testimony.

A. Sure. I'm happy to explain that. Dr.
Chatterjee was trying to find source code in
various files that XU had to try and identify
20 elements within the patents and show that these
21 elements were implemented in the computer code
22 that XU wrote.

23 I was obviously paying careful
24 attention to the actual computer code, to see if

I agreed with his conclusions about the actual computer code. And there's some examples.

For instance, this was with a really important element. This is the one that really talks about the idea that you have different ways of asking questions, and that they relate to an underlying criteria, so that you have some commonality and that's what makes the '903 patent, add flexibility to your system.

Unfortunately, what he has listed are just a set of subject areas, like math and algebra. There are no underlying criteria, there are no multiple layers, and there's certainly no organization of layers of criteria. And the reason he does not list that is that there aren't any underlying criteria in the XU system, so he wasn't able to find opinions that showed that.

Q. Let's go to the next slide. What was wrong with his opinion about this piece of source code?

A. So what he was showing with this piece of source code is the fact that you can have skills. You can have people with skills. Yes, you can have people with skills and that's something that

you often do in any skill based system where you have to have experts, where you can contact center agents.

The problem is the example shows no underlying criteria. I realize it says criteria I.D. on the bottom, but that's actually just the type of question, it's not underlying criteria, and he does not show any skill set database connected to that underlying database because there is none to show.

Q. Okay. Let's go to the next slide. Okay.

Was there a flaw in concluding that the source code showed this element?

A. Dr. Chatterjee was using these pieces of computer code to try and explain that there's a unique routing identifier in the skill set database to inquiry type. In other words, is there a connection between the skills that people have and the kinds of questions that people can ask.

Now, the problem is what he ended up showing actually does not point to the kinds of questions people asked, just to the skills they have. So he ended up showing the wrong table on

the screen.

Q. And let's go to the next slide, Dave, if you could.

A. This is a really important element. If you will recall when I talked about, and this is a typo, it should be "server," not "sever."

The idea behind this was, this was sort of a home run, it's where the system actually allows somebody to make a question, to say, okay, this is the topic that I'm interested in, and the system is going to go figure out what expert can help them. Right?

So the computer code has to save, tell me your question. It has to go figure out, who should help them. And then it will connect them up. That's the whole point of the patent.

But, unfortunately, the example that he has here, what you are seeing down below where it says create child's, all it's doing is creating a set of questions. It's never showing

how people are interactively using the system.

It's never showing how the system is able to go

and figure out what expert knows anything about

those topics. And it's never showing how you are

able to connect the two of them together.

So it's really an incomplete piece of source code that does not demonstrate any of that.

5 Q. All right. Let's take a look at the '709 patent. Let's go to claim 5. Let's start at Element D. We'll go through this quickly, hopefully.

10 So if you can talk about, you were Lear for his testimony about this element. Is there a flaw in code that he relied on?

A. This is a really important flaw, actually, in what Dr. Chatterjee was doing, with due respect to Dr. Chatterjee. The whole point of 15 the '709 patent, I will talk about this again, is to make it possible for the administrator to configure the system up, so that it's asking you the right questions interactively to figure out your problem and connect you to the right expert.

20 So it's really important, this one.

21 The first member of the organization is the administrator. But what he's showing isn't any 22 code that shows any administrative window that 23 would allow the administrator at the company, 24

Wherever they are, to actually decide what the questions are and what the relation ship of the questions and values are to present to somebody.

What he's showing instead is just a bunch ever hard coded specific examples.

Language arts, mathematics, in code, which does not make any sense. The database should be empty, and then when you buy it, you should put in mathematics and language using code that helps you do that.

The reason that this is all he can show is because this system is what we call canned. It's built into it specific examples that they use for demonstrations. So there is no configuration window for him to put here and show.

Q. Okay. And the next element, is there any evidence in the code that he relied on here to tell the jury about that element E is --

A. One of the interesting things about Element E that we talked about last week is that '709 is really powerful in this patent, because I'm not going to get the same set of questions and choices as Mr. Sobel.

So the idea is to customize it so I
get the right questions and choices for who I am,
whether I'm a gold cardholder or not. And Sobel
gets the same kind of choices that are
5 appropriate to him.

But the code that he's showing is
putting a little scroll down window on the screen
to choose from with no relationship to who is
going to ask the question. That could
10 demonstrate the system does not have the ability
to do any of the pre-selected criteria set by the
first member that we're talking about.

Again, the code actually is useful in
showing that it does not do precisely that
15 function.

Q. All right. And let's skip ahead to G.
How about this? You were here for an opinion on
this. Did you agree with it?

A. Read this one. Database is practice
20 parameter, a course from which inquiry values are
21 retrieved. The problem is all it's doing is
22 writing on the screen. He has never actually
23 identified any parameter that shows you how you
24 look up in the database for the parameter the

source from which you get the values people are selecting.

Again, this is about the idea that to make selections, you have to know where those selections are so you can hook them up to the expert.

What this code is doing is actually putting things in the database on top and at the bottom it's simply writing down stuff on the screen. It's not showing how the system knows where the selections are at all.

Q. All right. Let's do one more.

Let's go to H of the '709 patent. You were here for this.

Did you agree with what he was saying when he was talking about Element H?

A. No, I didn't agree. This was sort of the home run. The '709, it was the last element in the '709 where everything happens.

And, again, in the '709 case, the interesting bit here was that the person who's using the system to try and explain what their question is is being responsive to something that is an administrator set up for them to do. In

fact, instead of showing computer codes that shows how the administrator can set that up within the human context.

All that Dr. Chatterjee has done is show two different examples here. One is with coaching and one is with courses.

These are simply pre-canned examples for demonstration that you can choose between. They don't demonstrate the administrator can set it up. And they don't demonstrate that you can interactively use it.

Q. Okay. And when XpertUniverse received Dr. Chatterjee's report, they sent it to you to give your opinion about what his conclusions were?

A. Yes. I did detailed evaluation of the whole report.

Q. And did you agree with him that that report implemented the claimed invention of the '709 and '903 patent?

A. No. It does not implement those patents at all.

Q. We just talked about some of those; right?

A. That's correct.

Q. Now, turning to Dr. Forys' testimony, you

were here in the courtroom when Dr. Forys testified; right?

A. Yes. I was here yesterday as Wilmington.

Q. Okay. You've went through some of the patents he claimed are prior art and that's why the patents were invalid.

Did you have a problem with his methodology that he used?

A. Well, there's some -- there's some issues. Again, with due respect to Dr. Forys, the challenge is that he was being very general in saying, Well, all these things were already done before. And when you're looking at the patent, what really matters is to look at the specifics, what is in the description of the patents.

He's talking about: Does that, in fact, disclose the specific invention in the claims of the '903 and the '709? So one aspect that I think is a big problem is that he's being very generic kind of using large brush strokes instead of talking about specifics.

More importantly, I think there's two major types of mistakes, if you will, that he's making throughout his analysis.

One of those is with respect to the
'903 patent. He seems to be thinking that
skills-based routing, what people -- some people
call competently-based routing is basically the
5 same as the '903 patent.

So if I can find any patents that
somehow route questions to people who have
skills. I've shown that the '903 patent is no
good. And nothing could be further from the
10 truth.

The '903 patent isn't about a
specific routing protocol at all. It's about how
you're storing information about the questions
and in a flexible way.

15 The '709 patent, he's doing as a
similar thing. He seems to be thinking that any
patent he finds that has fields that you fill out
that helps you identify questions, that's the
'709 patent. And, of course, there's many
20 systems that have fields that you have fill out
21 online.

22 There even have been from the
23 2000's. Interesting bit with the '709 patent is
24 the idea that an administrator can set it up.

You can have the values and choices, and that the values and choices and inquiries are going to be able to be customized to you. So that it helps you efficiently fill out formalities in the right way, so you can ask the right question.

Q. Okay. Let's take a look at some of the patents that he said, you know, rendered the patents invalid.

MR. SOBEL: Can you go to DX-67, David? We heard about this one yesterday Venkantesh. Do you agree with his opinion that Venkantesh invalidates both patents?

A. Not at all. Venkantesh is not really relevant to these patents for one specific reason. Venkantesh was all about the idea of setting up an organization, so you have an organization with some other organizations.

You have a reasonable way to think about all the different departments in your company. The problem is it has no underlying criteria. It doesn't disclose anything about the idea of flexibly maintaining information relating it to other like criteria with multiple layers.

And that's exactly the innovation

that makes the '903 patent so exciting to me.

Q. Okay. And how about the '709 patent?

A. The '709 patent is even less relevant to Venkantesh because, again, Venkantesh is really
5 about this idea that you're dividing up your organization, so that you can have different questions go to different parts of the organization.

MR. SOBEL: Okay. And let's look at
10 DX-68, David.

BY MR. SOBEL:

Q. And this was discussed. You discussed this one.

Did you agree with him on his
15 opinion on Gabriel?

A. Gabriel is very similar. It doesn't have inquiry criteria.

It also doesn't have layers. I am
sorry.

20 When I say very similar, I mean,
21 very similar to Venkantesh, not to the '709
22 patent. It's a queuing system.

23 It doesn't have any inquiry-type
24 layers. They certainly don't relate to any

underlying criteria and it doesn't have any way
for a manager to flexibly make changes to those.

And so Gabriel is not relevant to
the '709 or the '903 patent.

5 Q. The next one he talked about was DX-56 and
that was Sassin; right?

You were here when he talked about
that. Did you agree with his opinion about
Sassin?

10 A. No, I don't. It's actually interesting.

The Sassin patent is about something
called Decision Treatise. If you've ever done
tree identification and you decides does it have
cones or not? Yes, it has cones. Does it have
15 two or other three needles?

Okay. It's a red pine. That idea
of going through. And if then this patent is
about the very clear idea of why you're using one
of those decisions, tree-making decisions about
20 where you are stopping, staying, going away,
21 coming back later and resuming it.

22 That's what this patent is about.
23 It has nothing to do with the '893 or the '709
24 patents.

Q. Okay. And let's talk about DX-49 that was Chauhan.

You were here when he talked about that, Dr. Forys. Did you agree with his opinion about Chauhan as it relates to the patents-in-suit?

A. No. We're not seeing Chauhan, but that's okay. The Chauhan patent was basically about the idea --

Q. That's DX-49.

A. Maybe we just don't have the front page for it. The Chauhan patent is basically about the idea that people express their question just by texting, typing it in. And then get an answer from an expert.

It's Ask.com. Its an interesting patent because that's a really useful thing to do, but it doesn't relate to the data representation we are talking about for the '903 or to the interactive way of expressing the question like we do with the '709. So it's not relevant, either.

Q. All right. And he also talked about DX-477 and that was Sollenberger.

Do you agree with his opinion about that?

A. The Sollenberger patent is also irrelevant. I don't agree with his opinion.

5 It's about the idea that a company sometimes doesn't want their people, their employees to do searches on the internet. So can we create a microscopic version of the internet called an intranet inside the company, so they
10 can do their searches in a walled garden rather than outside in the main internet.

 That's all the Sollenberger patent is about. As you can surmise, that's not relevant to either of the patents in question.

15 Q. Okay. And the last patent, you mentioned was DX-65. This was Judkins. And I believe you talked about this already.

 But you said earlier that the problem was that Dr. Forsys interpreted that
20 anything that was skills-based routing, you know, that means that if skills-based routing has
21 some -- you invalidate the patent.

23 Does this example of the problem
24 with --

THE COURT: Mr. Sobel, I'm sorry.

Mr. Schuman's about to object.

Could you ask a slightly less
leading question?

5 MR. SOBEL: Sure.

BY MR. SOBEL:

Q. Can you explain why you disagreed with
Dr. Forys' opinion on about this patent?

A. I'm happy to do so. It does say
10 skills-based routing method. I see why you
started saying skills-based routing.

Judkins' patent is, indeed, about
skills-based routing about the idea that if you
are asking questions in the system and you have
15 people with many different mixes of skills, you
have specialized ways to get to the right expert
as quickly as possible. Usually this is asking
somebody in a contact center.

It was a really interesting topic.
20 But, again, it's not relevant to what we're

21 talking about, which is how you maintain the
22 knowledge in the system and how you have people
23 ask their questions.

24 Skills-based routing, in general,

has been around. There's many, many patents on it, and none of them show information that would invalidate the '903 or the '709 patent.

Q. Okay. And, in your opinion, do the claimed inventions of the '709 or '903 patent satisfy a long-felt need in the contact center industry?

A. Yes. I was in the contact center industry. And in being in that industry and understanding what the needs are, we often work with people who needed part-time experts to come into the contact center to work. And, boy, would this help because we wouldn't have to take those people, rip them out and cut people in the contact center for two exact hours a day. They could do sort of both jobs at once, so it was really nice.

Q. So, again, that was, you testified earlier in the trial, your time at Blue Pumpkin and then Witness from what years?

A. 1996 is when we started Blue Pumpkin and I worked with Witness up until, I think, 2006.

Q. Okay. All right.

Now, let's talk about

noninfringement -- the infringement for a moment.

Now, I understand you were teaching classes on Monday, but did you have an opportunity to review Monday's trial transcript of Mr. Satish Gannu that talked about Pulse and Mr. Lepore who talked about Expert Advisor?

A. Yes, after I finished teaching, I read the entire transcript for the day Monday night.

Q. Okay. You know Mr. Gannu, he testified about certain things about Pulse.

Did that change your opinion in any way?

MR. SCHUMAN: Your Honor, can we have a side-bar?

THE COURT: All right.

(Beginning of conference held at side-bar:)

MR. SCHUMAN: First of all, I think this is Mr. Sobel reiterating the testimony that we heard in Court. But more importantly, Your

Honor, I think it's beyond the scope of his rebuttal. They were disclosing Mr. Nourbakhsh, in my understanding and Mr. Steinhoff to address the validity, not to talk about noninfringement

again.

THE COURT: Well, Mr. Sobel?

MR. SOBEL: Yeah. They -- first of all, we didn't limit our disclosure when we said
5 Dr. Nourbakhsh and saying he's only going to testify about invalidity. We just identified him as our rebuttal case. And they have a counterclaim that they didn't infringe.

MR. SCHUMAN: So --

10 THE COURT: Well, I think the counterclaim that they didn't infringe is just a mirror image of your claim that they did infringe. So I don't think that's actually introducing anything new.

15 And so, but just because -- so, I don't know if that helps you. But the question seems is -- but just because you have presented evidence on infringement during your case in chief doesn't necessarily mean you can't present
20 rebuttal evidence now.

21 So what is it you're proffering that
22 he's going to present?

23 MR. SOBEL: Well, he's going to --
24 they put on certain evidence of Dr. Forsys and

he's going to explain why that evidence does not
or, you know, rebut his opinion.

THE COURT: Well, Dr. Forys, he
wasn't about infringement, was he?

5 MR. SOBEL: Yeah. I think he said
it doesn't infringe. He said that that doesn't
include elements -- this doesn't include that
element.

MR. SCHUMAN: He did, Your Honor.

10 THE COURT: So --

MR. SCHUMAN: If this is in some way
rebuttal to Dr. Forys. But the way this question
started, were you in court listening to Dr. --

15 THE COURT: Tell me what Mr. Gannu
said that we're going to hear in trial next and
Mr. Lepore. And I don't think that's proper
rebuttal even though they have a counterclaim.

20 They say it's on their counterclaim
for noninfringement. I guess what I'm wondering
is: What exactly these witnesses said?

21 You know, it's funny. I would have
22 tended to look at it the other way around, which
23 is they knew what Dr. Forys was going to say. So
24 that's stuff that could have been addressed in

their case in chief. What Mr. Gannu or Mr. Lepore and Mr. Dry were going to say, I can't remember, but I think some of these people weren't deposed. Right?

5 MR. CANTINE: Certainly Mr. Dry.

MR. SCHUMAN: Two or three were deposed and they did know what they were going to say. And they addressed that in their case in chief.

10 Mr. Dry was not deposed at their decision. But who was deposed was Mr. Slamecka who was their 30(b)6. In other words, he was hemmed in by what Mr. Slamecka said.

So they knew what the testimony was going to be about Remote Expert as well. This was all addressed in the case in chief.

THE COURT: Mr. Sobel.

MR. SOBEL: What Mr. Slamecka didn't know anything about, he wasn't even an engineer on -- Slamecka they put on as a 30(b)6. I flagged this issue at the beginning of the case.

22 THE COURT: All right. So I think
23 Mr. Dry might be in a slightly different
24 position.

What about those other two?

MR. SOBEL: Well, I mean, they brought out stuff that, I mean, thinking about what Gannu testified about. You know, they came in and raised things that, you know, were new and, you know, it wasn't something that Dr. Forys relied on in his report.

And they just came in and they're going to try to tie that into their closing presumably that it doesn't infringe. But that's not what these two people say.

THE COURT: What is it that you expect Dr. Nourbakhsh to say?

MR. SOBEL: That what he heard from those witnesses confirms his opinion. The fact that he heard from those witnesses doesn't discount his opinion.

MR. SCHUMAN: Last point, Your Honor. If any of these witnesses we're talking about had changed what they said in their deposition months, if not years ago, we would have heard that on cross-examination.

So, Dr. Forys -- I'm sorry, Dr. Nourbakhsh, Mr. Sobel, they've all had the

benefit of in substance exactly what the witness
has said on the stand. Yesterday this is before
the rebuttal case.

THE COURT: All right. Well, here's
5 what I think. I haven't heard, from what you
just said, Mr. Sobel what he's going to say about
Mr. Lepore and --

MR. SCHUMAN: Gannu.

THE COURT: -- Mr. Gannu. Thank
10 you.

You know, it sounds to me like your
proffer is that he's going to say, Yeah. I heard
what they said. It doesn't change my opinion.

MR. SOBEL: I think he's going to
15 say more than that. I think he's going to say
specifically, you know, what their -- what it is,
you know, not just going to make a conclusion
statement.

THE COURT: So what it is, that's
20 what I was trying to get from you. What is it
21 he's going to say?

MR. SOBEL: Oh, I think that -- I'm
22 not the expert, but let me think. I think one of
23 the things he's going to say is what Gannu said
24

about the clicking, the left clicking and the right clicking, why that confirms his opinion.

And that what Gannu said about the index, why that confirms his opinion. And that what Mr. Lepore said about the calls does not have -- is not -- you know, does not contradict anything that he had said.

THE COURT: All right. Well, I mean, those people testified as fact witnesses.

And so I don't think you really -- I don't think that's -- I don't really think that's proper rebuttal. If you've got a question for him about Mr. Dry, I will allow that because you were hearing from the inventor I think -- not the inventor, but the engineer who designed it is different from him, the 30(b)6.

And if you've got something that he's going to say about that, you can go ahead and ask him.

MR. SOBEL: Okay. How about Dr. Forys?

THE COURT: Well, what is it that he's going to say about Dr. Forys that you think he should have -- I mean, I think that should have been covered in your case in chief.

MR. SOBEL: I have to -- I'm not sure because I don't really know, standing here, exactly what it is. But Dr. Forys' testimony --

THE COURT: But you're pretty sure
5 he's going to say that Dr. Forys was wrong?

MR. SOBEL: That's the general gist.
Right.

THE COURT: All right. Well, then I'm not going to let him testify about that.

10 MR. SOBEL: Okay.

THE COURT: So you can ask him the question about Mr. Dry.

MR. SCHUMAN: Just the last thing about Mr. Dry. I'm going to have to get up if
15 he's offering new opinions that are beyond the scope of what he said in his opinion. If there's some brand new opinion that we are going to have an objection, I won't ask for side-bar. He can't offer new opinions at this stage of the game.

20 THE COURT: All right.

21 (Conclusion of conference held at
22 side-bar.)

23 BY MR. SOBEL:

24 Q. All right. So you were in the courtroom

yesterday when Mr. Dry talked to about Remote Expert; right?

A. Yes, I was.

Q. Okay. And did Mr. Dry verify your
5 opinions regarding whether Remote Expert
infringed the '903 patent?

A. Yes. His descriptions were useful. In fact, they reinforced my opinions.

Q. Okay. And your opinion regarding -- can
10 you tell us which of your opinions in your
report, you know, Mr. Dry verified?

A. Sure. What Mr. Dry did was he talked a little bit about how the system actually works. In the case of Home Depot, for instance, one of
15 the important parts of the '903 patent, you can kind of imagine is that big paragraph in the middle.

The element that's all about the idea that you have two or more in gray type
20 layers. You can ask multiple questions and that
21 they're associated with an underlying criteria.
22 And one of the things that Mr. Dry talked about,
23 you'll recall at first, was that there's one big
24 orange button.

And you press the button and you get
to a kitchen -- kitchen person. But kind of fast
forward further in his testimony, he talked about
the fact that there's actually two buttons,
5 because there's a help button as well.

And then he showed a screen that had
six buttons. And those six buttons were for, I
think, for banking. I think he was -- for
financial banking services, which those six
10 possible kinds of questions you can ask.

And then he went on to say actually
the way different Home Depots are using it. You
will recall he talked about hitting the button.
You can have lots of buttons.

15 Some can be hidden. Some can be
shown. And different Home Depots can share the
same side of the business. They hide them and
they show them.

That was really near the end. Then
20 he said that those are really great pieces of
21 evidence about the idea that you can have
22 multiple kinds of layers and you can just choose
23 which layers to show.

24 He also talked about the fact that

Remote Expert has multilingual capability. And
he said that not only does it have multilingual
capability, but it's really easy to add a new
language because you simply have to change some
5 specific codes relating to a button.

And that's a great reinforcement
because, in fact, the whole point of the '903
patent is to make it easy to add layers by having
everything else -- not have to change everything
10 every time you add something new. And so that
reinforces what I believe as well because you can
have multiple layers.

The other thing he talked about is
counsel took him through the -- I think it was
15 the expert type table, the database table,
explaining what's in that table. And what he
described to be in the table resonated with what
I believe, which is that the table had a column
in which you have a sort of trunk line for the
20 kind of people who can help. So it's identifying
the experts.

It has a call line for the button,
22 explaining what the picture is and what the
23 question is. So that's where you're defining the
24

particular inquiry type. The people you can see.

And the ID number for that row. A unique ID.

So, now he did say that. I disagree with that as well.

5 He said, We don't have an ID that routes a question to an expert. And I disagree with that because, in fact, as he talked about that table, that row, has an ID number because the people and it has the question. It's all
10 there.

And from the ID to the question to the people that can handle that call. And by my interpretation that successfully fulfills that second to last element in that claim, which is
15 that you have that parameter.

MR. SOBEL; okay. Thank you, Dr. Nourbakhsh.

THE COURT: All right. Any cross-examination?

20 MR. SCHUMAN: I have no questions for you at this time, Dr. Nourbakhsh.

22 THE COURT: All right.

23 Mr. Nourbakhsh, you can step down.

24 MR. CANTINE: I'm pleased to

announce that the plaintiffs rest.

THE COURT: And Mr. Schuman, I
assume there's nothing more from the defendant?

MR. SCHUMAN: Nothing more other
5 than a couple things we should discuss at
side-bar, Your Honor.

THE COURT: All right. Ladies and
gentlemen of the jury, so the evidence part of
the case is over. There is what judges and
10 lawyers like to refer to as housekeeping matters
to be taken care of part of which is at some
point this afternoon I'm going to be instructing
you on the law that you're going to apply. Not
to scare you or anything, but this is the volume
15 that I'm working from right now. It's about
three-quarters of an inch thick.

And in order to help you follow
along, we're going to have a copy for each of you
of the instructions and so there's certain, among
20 other things, chopping it down, but also, just
21 matters that are legal issues I have to resolve
22 and to get it into a kind of a final format.

23 So we've been working on this, you
24 know, outside of your presence as the trial goes

along. But it's hard to get to the final version until the evidence is done.

So, we need to work on that and one or two other things. And so what I'm thinking is what I'd like to do is to send you back to the jury room and basically declare until at least one o'clock to be your very long lunch hour. I'm not sure whether we'll be ready to go at one o'clock or not, but what I'd like to do is for you to be -- you know, for you to be ready to go and we'll -- I'm optimistic that, in fact, we can be ready to go then, but I'm not positive.

And the only other thing I would say is that when we do so, basically the three main chunks left of the -- there's some little bits and pieces, but there's me reading to you the instructions, and there's a main closing argument by both the plaintiff and the defendant.

Those are the three big chunks of time that are left. And so we'll be wanting to take little breaks in between them, too, because it's very important, obviously, as it has been through the whole trial that you listen.

And it's just hard to listen to

people talk for, you know, a long period of time.
So we try to give them breaks so you can stretch
and, you know, give it your full undivided
attention.

5 You know, you've been a great jury
so far in giving your attention. But we try to
put you in the best position to keep that up.

 So why don't we take the jury out
and we'll hopefully see you at one o'clock.

10 (Jury leaving the courtroom at 11:13
a.m.)

 THE COURT: All right. Be seated,
please.

 Mr. Schuman, what did you want to
15 take up outside the presence of the jury?

 MR. SCHUMAN: Well, Your Honor, we
have a Rule 50 motion on our invalidity
counterclaims. That's Counts I, II, III, IV and
V with respect to the two remaining claims for
20 infringement in the two patents.

21 And we think that we, in our case,
22 established clear and convincing evidence and
23 that the patents are invalid. And in the
24 rebuttal case we heard here today, they did not

do anything to take away from that evidentiary presentation we made.

Nothing Dr. Nourbakhsh said by way of supporting criticisms of Dr. Chatterjee. The evidence is in the record, Your Honor. We'll connect the dots in closing if we need to, but for purposes of this motion, the defendant's exhibits that were admitted through Mr. Friedman regarding the Allstate presentation is an offer to sale the KnowledgeSHARE platform in March of 2003, which is a month before the critical date. And Dr. Chatterjee has established that the code for the offer that they were making KnowledgeSHARE, the product, the unfinished product.

But, nevertheless, for purposes of 102(b), you don't have to have a finished product. They were clearly offering KnowledgeSHARE for sale to Allstate a month before the critical date.

And we've established through inventor testimony that the patents were in that product. And, obviously, Dr. Chatterjee very precisely went through the codes.

So that's our judgment.

As a matter of law, on the
invalidity Counterclaims I, II, III, IV and V, we
also renew our motion for judgment, as a matter
5 of law with respect to XU's case in chief. That
would be the remaining concealment claim and, of
course, our noninfringement with respect to the
two remaining claims and the four remaining
products.

10 It's important that I make sure I
didn't miss anything.

THE COURT: All right.

MR. SCHUMAN: Thank you, Your Honor.

15 THE COURT: All right. I'll take
that under advisement.

So is there anything else before we
talk about the jury instructions?

All right. So I had a little bit
chance to go through what I had gotten this
20 morning. Obviously, the cover page, you know,

21 that will just be boiled down to jury
22 instructions.

23 I know it's difficult and I see
24 you've been doing so far, but the instructions

we've deleted, you know, make sure they get taken
out of the Table of Contents.

On 3.00, the Preponderance of the
Evidence and the second paragraph about what
5 Cisco has to prove, that's now out of the case.
So that needs to come out of the jury
instruction.

Right. And when I say right, Mr.
Rovner, I'm sort of talking to you. Well, who is
10 it that going to make sure that these things get
done; right?

MR. ROVNER: Well, I'll do my best,
Your Honor. I think we're all in this together,
so...

15 THE COURT: Well, yeah. Yeah.

But you're the point man.

MR. ROVNER: Okay.

THE COURT: Okay. So particularly,
Mr. Rovner, if you don't understand what I say,
20 speak up.

21 Oh, and just as a general matter,
22 can we, on the next version, also take out all
23 the citations to authority?

24 MR. SCHUMAN: Yes.

MR. ROVNER: Yes.

THE COURT: So on 4.0, Page 6, the
second paragraph where it says, The only claims
that require clear and convincing evidence are
5 punitive damages for concealment, willful
infringement aspects of patent invalidity. I was
thinking probably that ought to read now, The
only claims require clear and convincing evidence
are patent invalidity.

10 Not a big deal, but Page 25 is
blank. Anything I can do to thin the pile for
the jury will be appreciated, I'm sure.

So Page 27, willful infringement,
that's going to be removed?

15 MR. SCHUMAN: Your Honor, the blank
Page 25, that was where we had the paragraph and
then the claim definitions, the Markman rules.

THE COURT: Oh, so that's going to
be replaced?

20 MR. SCHUMAN: Right. I think that
21 yesterday we discussed the introductory paragraph
22 staying in.

23 THE COURT: Right. Right.

24 Sorry. Okay.

That's great. Yes. Thank you.

Glad you pointed that out.

MR. SOBEL: Can we clarify what you mean by that?

5 THE COURT: There was an instruction that said, you know, essentially it's two pages long, most of which was here's what these terms mean. But there's a first paragraph that says, you know, you have to follow what I say these
10 terms mean.

And so that paragraph should, in substance, stay in there.

MR. SOBEL: Okay.

THE COURT: So Page 32,
15 Anticipation, we need to conform the second paragraph to say Claim 5 in the '709 patent, Claim 12 in the '903 patent.

Are the parties satisfied with Paragraph 2 on Page 32, the one that starts
20 XpertUniverse has lost its right if the claimed invention was already patented anywhere in the
21 world by XpertUniverse or anyone else?
22

23 MR. SOBEL: I think the -- just
24 strike the first four words and start if the

claimed invention.

MS. WALSH: I don't know that that makes sense. I don't know if that makes sense.

I don't know if that makes sense because that section, I think, is referring to 102(b) under loss of right. And so that's consistent with the statute and the jury instructions, the model instructions since it's one year prior to the filing date.

THE COURT: All right. Well, I guess one thing we could -- if we're not doing anything else, we want to remove the claim about if it was patented anywhere in the world by XpertUniverse. There's no evidence that XpertUniverse patented it.

MS. WALSH: Yes, Your Honor.

THE COURT: All right. The paragraph 14.7 about the level of ordinary skill, there's actually no expert testimony about what the level of ordinary skill is, is there?

MR. CANTINE: I don't believe there was, Your Honor.

MS. WALSH: No, Your Honor.

THE COURT: All right. Just an

Observation.

On 15.2, which is reasonable royalty
and then it says definition, you know, definition
doesn't -- that may be right out of the jury
5 instructions, but that doesn't really seem like
the right word.

Could we just put like factors to
consider instead of definition, something like
that?

10 MR. SOBEL: Factors to consider is
fine with us.

MS. WALSH: Yes, Your Honor.

THE COURT: Okay. And the
fraudulent concealment of punitive damages at
15 Page 49, that comes out. So that's what I've
got.

Is there anything -- I know
everybody's working hard on these things. Is
there anything else that anybody else wants to
20 bring up?

21 MR. CANTINE: I guess, obviously, we
22 need to get the verdict form.

23 THE COURT: No. No. I meant just
24 on the jury instructions.

MR. CANTINE: Did you guys have
comments on anything else?

MR. SCHUMAN: I think those are all
the issues on the jury instructions.

5 THE COURT: All right.

MR. SCHUMAN: Obviously, we'd just
like to see a final version.

THE COURT: Right. Here's what I'd
like is whenever it's hot off the presses, I
10 think, Mr. Rovner, you've got the final version
or whoever. But I'm assuming it is Mr. Rovner.

Get it to Cisco as soon as you can
so that they can read it. And if you think it's
the final version, send it to me, too, so we'll
15 be reading it hopefully or we'll be having lunch,
one or the other.

But hopefully we'll be reading it.
And I will try to get back to you.

Obviously, if Cisco gets back and
20 says they don't see any problems -- hopefully I'm
21 not going to see any problems. But I would like
22 to just -- you know, I hate to be reading the
23 instructions and see things and say, Where did
24 that come from? Okay.

So, are we clear on how we're going forward there?

MR. ROVNER: Yes. I think that once we get out of here, I am probably going to run back to my office. We'll coordinate. We can probably can get it turned around by 12:30, quarter of 1:00.

THE COURT: That would be great.

MR. ROVNER: It would be tough for the 1:00 o'clock deadline.

THE COURT: Well, deadlines help, but I understand. You know, it's important that we get it right. Deadlines are important, but more important here to get it right.

All right. So the verdict form. How are we doing on that?

MR. SOBEL: We received their comments and we have to look at it.

THE COURT: Okay. Ms. Walsh, are you the verdict form commenter?

MS. WALSH: Yes.

THE COURT: All right. Are the comments extensive or -- and I don't mean this in a derogatory way. Are they nit-picking?

MS. WALSH: No. We broke out the --
we broke out the infringement claims by product.
Yes or no for Expert Advisor.

THE COURT: I kinds of think you've
5 got to do that.

MR. SOBEL: I just have not had a
chance to look at it.

THE COURT: Right. Because time is
running out. What else?

10 MS. WALSH: And then we conformed to
the orders on infringement.

THE COURT: You've got to do that.

MS. WALSH: And then there's a
change in language on the damages portion, what
15 damages do you find XpertUniverse has proven by a
preponderance of the evidence. That's all.

THE COURT: All right. Well, I
can't tell about the last one.

Why don't, Mr. Sobel, you read it,
20 and you and Ms. Walsh stay in close

21 communication, and if you can't work something
22 out, you know, e-mail me. Okay?

23 MS. WALSH: Okay.

24 MR. SOBEL: Okay.

THE COURT: All right. So we're heading in a good position here. You know, and if we're not ready to go at 1:00 o'clock, we're not going to go at 1:00 o'clock. But I wanted to make sure that if we fall back a little, there's still time to get these things in this afternoon. Okay?

MR. CANTINE: You're going to read the jury instructions after closing?

THE COURT: No. No. I would like to read basically all but the last two or three pages or four. I would think all things considered, that would take about a half-an-hour, maybe 40 minutes.

MR. CANTINE: Okay. And it would be the case that I would break for ten minutes. However long it takes me, I'm going to break for ten minutes to give them a chance to wake up for you. When you are done, I will give them a ten-minute break and give them a chance to wake up for you.

And I may or may not, depending on what time it is, and various random factors, give you, you know, a few minutes to think about what

you're going to say in rebuttal. But don't count
on that. Okay?

MR. CANTINE: Understood.

THE COURT: And -- okay?

5 MR. CANTINE: Thank you.

MR. SCHUMAN: Thank you, your Honor.

MR. ROVNER: I'm just going to hand
up the order on claim construction with out
proposed in there.

10 THE COURT: Okay. I think they are
a nice round number, 11 topics (handing documents
to the Court).

THE COURT: All right. I'm going to
sign it each individually.

15 MR. SCHUMAN: Two housekeeping
matters. Is there a way to get a count on the
time so we know how much time we each have
foreclosing? We know approximately, but maybe to
the minute at this point is important.

20 THE COURT: Yes.

21 MR. SCHUMAN: Also, I think there
22 has been some cocoa ordination about the trial
23 exhibits, the binders, and how we mechanically do
24 that. Can we address that with somebody for a

few minutes?

DEPUTY CLERK: Kristen is going to come back in a few minutes. I've been in communication with her and the support staff.

5 MR. SCHUMAN: Thank you.

THE COURT: All right. So I'm signing this order on claim interpretation and I guess we'll make, I think we need to make our own copies so it has my signature on it, or we can
10 make ten copies. Okay?

All right. So I will be checking my e-mail. Thank you very much.

(Recess taken.)

- - -

15 (Proceedings commenced in the courtroom, beginning at 1:40 p.m.)

THE COURT: All right. Well, thank you everyone for working and getting these jury instructions.

20 Is there anything I need to discuss
21 before I bring in the jury?

22 MR. SOBEL: We had had that sidebar
23 at the end there. That our Rule 50 motion was
24 clear, that we believe that the defendant has

improved their case on invalidity of claim five
of the '709 patent, claim 12 of the '903 patent.
They have not claimed it has been on sale nor
anticipated, nor obvious, and no other basis
5 under 35 U.S.C. --

THE COURT: Right. I think we got
that.

By the way, the verdict form.

MR. CANTINE: I think it's still
10 being negotiated, your Honor.

THE COURT: All right. Well, you
can continue to negotiate it. Can you -- but
once we finish, it looks like the jury
instructions, any disputes that are still there,
15 I'm going to resolve. Okay?

All right. And so, Mr. Cantine,
you're just getting ready, but I'm going to be
reading for the next 30 minutes.

MR. CANTINE: Oh, are you? Do you
20 want me to turn it back? I will sit down.

21 THE COURT: Okay.

22 MR. CANTINE: Thanks.

23 MR. SCHUMAN: Real briefly, your
24 Honor, I notice I have 35 minutes left. I

thought that, I'm just wondering whether that sidebar there at the end was counted against us because I objected or whether it was split in some way because we sort of counted, I had maybe
5 about 40, 42 minutes left.

(Pause.)

THE COURT: All right. So how much time do you need? 40 minutes?

MR. SCHUMAN: 45 minutes would be
10 ideal, but I will take 40.

THE COURT: Why don't you take 40. You know, I'm pretty new at this and it occurs to me that the better way to do this is to actually set a time limit on the actual testimony rather
15 than including the arguments because it's easy enough to just cut off the testimony if you reach a time limit and it's hard to say. But I do appreciate that Mr. Cantine has used his time very wisely, so he has his full hour.

20 I think 40 minutes. Did I just say
21 40?

22 MR. SCHUMAN: You said 40.

23 MR. ROVNER: Yes, your Honor.

24 THE COURT: Can you do justice to

your case in 40 minutes?

MR. SCHUMAN: I will do my about
read his testimony very best. 40, 45 minutes,
your Honor. I have a timekeeper here who is
5 going to pass me a note and I will do my best to
finish.

THE COURT: Okay. All right. Okay.
Anything else? All right. Let's bring the jury
in.

10 And the order that I signed?

MR. CANTINE: We have a copy.

THE COURT: Yes. I'm just
wondering. So the idea is, there's a book they
have, which each of them has that has patents in
15 it.

MR. CANTINE: The juror notebooks
with the two patents, yes.

THE COURT: Okay. All right.

(Jury entering the courtroom at 1:44
20 p.m.)

21 THE COURT: And Mr. Rovner, do you
22 have copies of the jury instructions?

23 MR. ROVNER: I gave ten to Nicole.

24 THE COURT: You all may be seated.

Welcome back, Members of the Jury.

We have completed the jury instructions, I believe.

THE JURY: Sorry.

5 THE COURT: And I believe we'll
copies of the jury instructions to hand out in
just a second. Can we hand them out?

All right. Ladies and Gentlemen of
the Jury, I am about to read you these jury
10 instructions. You all know how each of you
individually best hears information and retains
it.

So some of you may want to just
listen to me, some of you may want to read along.
15 You know that's up to you. You will have the
written jury instructions that you can refer back
to in the jury room.

All right.

Now, that you have heard the
20 evidence and the arguments, it is my duty to

21 instruct you about the applicable law. It is
22 your duty to follow the law as I will state it.

23 You must apply the law to the facts
24 as you find them from the evidence in the case.

Do not single out one instruction as stating law,
but consider the instructions as a whole. Do not
be concerned about the wisdom of any rule of law
stated by me. You must follow and apply the law.

5 Nothing I say in these instructions
indicates that I have any opinion about the
facts. You, not I, have the duty to determine
the facts.

 You must perform your duties as
10 jurors without bias or prejudice to any party.
The law does not permit you to be controlled by
sympathy, prejudice or public opinion. All
parties expect that you will carefully and
impartially consider all the evidence. Follow
15 the law as it is now being given to you and reach
a just verdict regardless of the consequences.

 The evidence from which you are to
find the facts consists of the following:

 One: The testimony of the
20 witnesses;

21 And two: Documents and other things
22 received as exhibits.

23 The following things are not
24 evidence: Statements, arguments and questions of

the lawyers for the parties in the case,
objections by lawyers, any testimony I told you
to disregard, and anything you saw or heard or
you may see or hear about this case outside the
5 courtroom.

You must make your decision based
only on the evidence that you saw and heard in
Court. Do not let rumors, suspicions or anything
else you may have seen or heard outside the court
10 influence your decision in any way.

You should use your common sense in
weighing the evidence. Consider it in light of
your everyday experience with people and events
and give it whatever weight you believe it
15 deserves. If your experience tells you that
certain evidence reasonably leads to a
conclusion, you are free to reach that
conclusion.

There are rules that control what
20 can be received into evidence. When a lawyer
21 asks a question or offered an exhibit into
22 evidence and a lawyer on the other side thought
23 it was not permitted by the Rules of Evidence,
24 that lawyer may have objected. This simply means

the lawyer requested that I make a decision on a particular rule of evidence.

You should not be influenced by the fact that an objection was made. Objections to questions are not evidence.

Lawyers have an obligation to their clients to make objections where they believe the evidence being offered is improper under the Rules of Evidence. You should not be influenced by the objection or by the Court's ruling on it.

If the objection was sustained, ignore that question. If it was overruled, treat the answer like any other.

If you were and you were instructed that some item of evidence was received for a limited purpose only you must follow that instruction.

Also, if certain testimony or other evidence was ordered struck from the record or you were instructed to disregard the evidence, do not consider any testimony or other evidence that was struck or excluded. Do not speculate about what a witness might have said or what an exhibit might have shown.

XpertUniverse has the burden in this civil case to prove every essential element of the claims for patent infringement and fraudulent concealment by a preponderance of the evidence.

5 If XpertUniverse should fail to establish any essential element of a claim by a preponderance of the evidence, you should find for Cisco as to that claim.

Established by preponderance of the evidence means evidence which, as a whole, shows that the facts sought to be proved is more probable than not. In other words, preponderance of the evidence means such evidence as when considered and compared with the evidence opposed to it, or such evidence has more convincing force and produces, in your mind, belief that what is sought to be proved is more likely true than not true.

To say it differently, if you were to put the evidence favorable to XpertUniverse and the evidence favorable to Cisco on opposite sides of the scales, XpertUniverse would have to make the scales tip somewhat on its side in order to prevail on the claim. The standard does not

require proof to an absolute certainty since
proof to an absolute certainty is seldom possible
in any case.

In determining whether any fact at
5 issue has been proved by a preponderance of the
evidence, unless otherwise instructed, you may
consider the testimony of all witnesses
regardless of who may have called them, and all
exhibits received into evidence, regardless of
10 who may have produced them.

Cisco has the burden of establishing
the essential elements of the affirmative
defenses, namely invalidity of the patents. You
may have heard the term proof beyond a reasonable
15 doubt. That is a stricter standard applicable in
criminal cases.

It does not apply in civil cases
such as this. You should, therefore, put it out
of your minds.

20 The certain counterclaims, which I
21 will discuss later, namely the invalidity, the
22 patent claims, require proof by clear and
23 convincing evidence. Clear and convincing
24 evidence is evidence that produces in your mind a

firm belief or conviction that the allegations sought to be proved by the evidence are true.

Clear and convincing evidence involves a higher degree of persuasion that is necessary to be the preponderance of the evidence standard. The standard does not require proof to an absolute certainty since proof to an absolute certainty is seldom possible in any case.

The only claims that require clear and convincing evidence are patent invalidity, including anticipation and obviousness. All of the remaining claims that XpertUniverse claims are to be proved under the preponderance of the evidence standard.

Now, generally speaking, there are two types of evidence presented during a trial. Direct evidence and circumstantial evidence.

Direct evidence is testimony of a person who asserts a claim to have actual knowledge of a fact such as an eyewitness.

Indirect or circumstantial evidence is proof of a chain of facts and circumstances indicating the existence or nonexistence of a fact. The law generally makes no distinction

between the weight or value to be given to either direct or circumstantial evidence.

A greater degree of certainty is not required of circumstantial evidence. You should consider both kinds of evidence, and you're required to find the facts in accordance with the preponderance of the evidence of all of the evidence in the case, both direct and circumstantial.

You are to decide how much weight to give any evidence. If your experience tells you certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses.

Credibility means whether a witness is worthy of belief. You may believe everything a witness said, or only part of it or none of it.

In deciding what to believe, you may consider a number of factors, including the following: The opportunity and the ability of

the witness to see, or hear or know the things
the witness testifies to.

The quality of the witness'
understanding and memory.

5 The witness' manner while
testifying.

Whether the witness has an interest
in the outcome of the case or any motive, bias or
prejudice.

10 Whether the witness was contradicted
by anything the witness said or wrote before
trial or by other evidence.

How reasonable the witness'
testimony is when considered in light of the
15 other evidence you believe, and any other factors
that bear on believability.

The weight of the evidence to prove
a fact does not necessarily depend on the number
of witnesses who testify, but what is more
20 important is how believable the witnesses were

21 and how much weight you think the testimony
22 deserves.

23 You have heard testimony containing
24 opinions from witnesses. In weighing this

opinion testimony, you may consider the witness' qualifications, the reasons for their opinions, and the reliability of the information supporting those opinions, as well as the factors I've previously mentioned for weighing the testimony of any other witness. The opinion testimony should receive whatever weight and credit, if any, you think appropriate, given all the other evidence in the case.

In deciding whether to decide to rely on an opinion of a witness, you may consider any bias that the witness may have, including any bias that may arise from evidence that the witness has been or will be paid for reviewing the case and testifying or from evidence that the witness testifies regularly and makes a large portion of his or her income from testifying in Court.

You, as I have said, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and the conduct of a witness or by the manner in which a witness testified, or by the character of the testimony

given, or by evidence contrary to the testimony.

You should carefully examine all the testimony given, the circumstances under which each witness has testified, and every manner in evidence tending to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind and the demeanor or manner while testifying.

Consider the witness' ability to observe the matters as to which the witness has testified and whether the witness impressed you as having an accurate recollection of these matters.

Also, consider any relation each witness may have with either side of the case, the manner in which witness might be affected by the verdict and the extent to which the testimony of each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons seeing an event may see or hear it

differently.

In weighing the effect of the discrepancy always consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or intentional falsehood. After making your own judgment, you will give the testimony of each witness such weight, if any, that you think they may think it deserves.

In short, you may accept or reject the testimony of any witness in whole or in part.

In addition, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a large number of witnesses to the contrary.

During the trial, certain testimony has been presented by way of deposition. The deposition consisted of sworn recorded answers to questions asked of the witness in advance of the trial by attorneys for the parties to the case. The testimony of a witness who, for some reason,

was not present to testify from the witness stand
may be presented in writing under oath or on a
videotape. Such testimony is entitled to the
same consideration. It is to be judged as to
credibility and weighed and otherwise considered
by you, insofar as possible, in this same manner
as if the witness had been present and had
testified from the witness stand.

A witness may be discredited or
impeached by contradictory evidence or by
evidence that at some other time the witness has
said or done something, or has failed to do or
say something, that is inconsistent with the
witness' present testimony. A witness may be
discredited or impeached by evidence that the
character of the witness for truthfulness is bad.

If you believe any witness has been
impeached and thus discredited, you may give the
testimony of that witness such credibility, if
any, as you think it deserves. If a witness is
shown knowingly to have testified falsely about
any material matter, you have a right to distrust
such witness' other testimony, and you may reject
all its testimony of that witness or give it such

credibility as you may think it deserves.

An act or omission is knowingly done if it was done voluntarily and intentionally and not because of a mistake, or accident or other innocent reason.

Evidence that at some other time, while not under oath, a witness who is not a party to this action has said or done something inconsistent with the witness' testimony at the trial may be considered for the sole purpose of judging the credibility of the witness. However, such evidence may never be considered as evidence of proof of the truth of any such statement.

Where the witness is a party to the case and by such statement or other conduct omits some fact or facts against the witness' interest, then such statement or other conduct, if knowingly made or done, may be considered as evidence of the truth of the fact or facts so admitted by such party as well as for the purpose of judging credibility of the party as a witness.

An act or omission is knowingly done if it was down voluntarily and intentionally and not because of a mistake, or accident or other

innocent reason.

Now, I'm going to go to the law that relates to the actual claims in this case.

XpertUniverse claims that it was harmed because

5 Cisco concealed that XpertUniverse was denied admittance into the SolutionsPlus partner program from April 2006 to January 2007.

To establish this claim, XpertUniverse must prove the following six
10 elements: The first -- there's four alternatives -- that Cisco disclosed some facts to XpertUniverse, but intentionally failed to disclose another important fact, making the disclosure deceptive;

15 Or that Cisco intentionally failed to disclose an important fact that was known only to it and that XpertUniverse could not have discovered;

20 Or that Cisco and XpertUniverse were partners and Cisco intentionally failed to disclose an important fact to XpertUniverse;.

22 Or that Cisco actively concealed an
23 important fact from XpertUniverse or prevented it
24 from discovering that fact.

You should find this first element has been proved if you find that XpertUniverse has proven any one of those four. The other five elements that are part of fraudulent concealment, two, that XpertUniverse did not know of the concealed fact; three, that Cisco intended to deceive XpertUniverse by concealing the fact; four, that XpertUniverse reasonably relied on Cisco's deception; five, that XpertUniverse was harmed; and six, that Cisco's concealment was a substantial factor in causing XpertUniverse's harm.

A fact is important if it would influence a reasonable person's judgment or conduct.

XpertUniverse relied on Cisco's concealment if the concealment caused XpertUniverse to either; one, forego other business opportunities or continue working with Cisco; and two, if it would probably not have done so without such concealment.

It is not necessary for a concealment to be the only reason for XpertUniverse's conduct. It is enough if the

concealment substantially influenced
XpertUniverse's choice, even if it was not the
only reason for the conduct.

You must determine the
5 reasonableness of XpertUniverse's reliance by
taking into account its knowledge and experience.
If you decide that XpertUniverse has proved its
concealment claim against Cisco, you must also
decide how much money will reasonably compensate
10 XpertUniverse for the harm. This compensation is
called damages.

The amount of damages must include
an award for all harm that Cisco was a
substantial factor in causing, even if the
15 particular harm could not have been anticipated.

XpertUniverse must prove the amount
of its damages. However, XpertUniverse does not
have to prove the exact amount of damages that
will provide reasonable compensation of the harm.

20 You must not speculate or guess in awarding
21 damages.

22 Turning to patent infringement.
23 XpertUniverse claims that Cisco infringed Claim 5
24 of XpertUniverse's United States Patent Number

7,366,709, the '709 patent, and Claim 12 of the
7,499,903 or the '903 patent.

In order to prove direct
infringement, XpertUniverse must prove by a
5 preponderance of the evidence that is more likely
than not that Cisco made, used, sold offered for
sale within or imported into the United States a
product, system, process or method that meets all
the requirements of a claim and did so without
10 permission of XpertUniverse during the time the
'903 and '709 patents were enforced.

You must compare Cisco's accused
products, system, processes and methods with each
and every one of the requirements of a claim to
15 determine whether all the requirements of that
claim are met.

You must determine separately for
each asserted claim whether or not there is
infringement. Before you can decide many of the
20 issues or patent issues in this case, you will
21 need to understand the role of patent claims.

22 The patent claims are the numbered
23 sentences at the end of each patent. The claims
24 are important because it is the words of the

claims that define what the patent covers.

The figures and text and the rest of the patent describe a description and/or examples of the invention and provide a context for the claims. But it is the claims that define the breadth of the patents coverage.

Each claim is effectively treated as if it were a separate patent and each claim may cover more or less than another claim.

Therefore, what a patent covers depends, in turn, on what each of the claims covers.

You will first need to understand what each claim covers in order to decide whether or not there is infringement of the claim and to decide whether or not the claim is invalid. The law says it is my role to define the terms of the claims and it is your role to apply my definitions to the issues that you are asked to decide in this case.

Therefore, I have determined the meaning of the claims and I will provide to you my definition of certain claim terms. You'll get a copy in the binder with the two patents.

You must accept my definition of

these words in the claims as being correct. It
is your job to take these definitions and apply
them to the issues that you are deciding,
including the issues of infringement and
5 validity.

I will now explain how a claim
defines what it covers. A claim sets forth in
words a set of requirements. Each claim sets
forth the requirements in a single sentence.

10 If a device or method satisfies each
of these requirements, then it is covered by the
claim. There can be several claims in a patent.
Each claim may be narrower or broader than
another claim by setting forth more or fewer
15 requirements.

The coverage of a patent is asserted
claim by claim. In patent law, the requirements
of a claim are often referred to as claim
elements or claim limitations.

20 When a thing such as a product or a
21 process meets all the requirements of the claim,
22 the claim is said to cover that thing and that
23 thing is said to fall within the scope of that
24 claim. In other words, the claim covers a

product or a process where each of the claim elements or limitations is present in that product or process.

Sometimes words in the patent claim are difficult to understand. And, therefore, it is difficult to understand what requirements these words impose.

It is my job to explain to you the meaning of the words in the claims and the requirements these words impose. And as I just instructed you, there are certain specific terms that I have defined, and you are to apply the definitions that will be provided to you.

By understanding the meaning of the words of the claim and by understanding that the words in the claim set forth the requirements a product or process must meet in order to be covered by that claim, you will be able to understand the scope of the coverage for each claim.

Once you understand what each claim covers, then you are prepared to decide the issues that you will be asked to decide such as infringement and invalidity.

As I've mentioned, I will provide
you with an order explaining to you the meaning
of some of the words in the claims in this case.
The order will explain some of the requirements
5 of the claims.

As I've previously instructed you,
you must accept my definition of these words in
the claims as correct. For any words in the
claim for which I have not provided you with
10 definitions, you should apply their common
meaning.

You should not take my definition of
the language of the claims as an indication that
I have a view regarding how you should decide the
15 issues that you are being asked to decide such as
infringement and invalidity. These issues are
yours to decide.

The beginning or preamble of certain
claims use the word comprising. Comprising means
20 including or containing, but not limited to.

That is, if you decide that an
21 accused product or the use of an accused product
22 includes all the requirements or steps in that
23 claim, the claim is infringed. For example, a
24

claim to a table comprising of a tabletop, legs and glue would be infringed by a table that included a tabletop, legs and glue, even if the table also included wheels on the table's legs.

5 Patent invalidity is a defense to patent infringement. Even though the United States Patent & Trademark Office examiner has allowed the claims in the patent, you have the ultimate responsibility for deciding whether the
10 claims of the patent are valid.

 I will now instruct you on the invalidity issues you should consider as you consider these issues. Remember, that Cisco bears the burden of proving that it is highly
15 probable that the claims of XpertUniverse's patents are invalid.

 In making your determination as to whether a patent claim is valid or invalid, you must consider each patent in each of the claims
20 of the patent separately and individually, as you
21 did when considering whether the claim was
22 infringed or not. If the evidence is clear and
23 convincing that a claim, in a given patent, fails
24 to meet the essential requirements of the patent

laws, then that patent claim is invalid.

However, if you find that one or more claims of a patent fail to meet the essential requirements of the patent laws, it does not necessarily mean that the remaining claims of that patent are also deficient or invalid.

I think you've heard the term prior art. Prior art may include items that were publicly known or that had been used or offered for sale, publications or patents that disclose the claimed invention or elements of the claimed invention. To be prior art, the item or reference must have been made, known, used, published or patented before April 2, 2004 for the '709 patent or January 24, 2005 for the '903 patent.

For the claim to be invalid, because it is not new, Cisco must show that all the requirements of that claim were present in a single, previous device or method that was known of, used or described in a single previous printed publication or patent.

We call these things anticipating

prior art. To anticipate the invention, the prior art does not have to use the same words as the claim, but all the requirements of the claim must have been disclosed, either stated expressly or implied to a person having ordinary skill in the art and the technology of the invention. So that looking at that one reference, that person could make and use the claimed invention.

In order for someone to be entitled to a patent, the invention must actually be new and the inventor must not have lost his or her rights by delaying the filing of an application claiming the invention. In general, inventions are new when the identical product system, process or method had not been made, used or disclosed before. Anticipation must be determined on a claim-by-claim basis.

Cisco contends that Claim 5 of the '709 patent and Claim 12 of the '903 patent are invalid because the claimed inventions are anticipated, or because XpertUniverse lost the right to obtain a patent. Cisco must convince you of this by clear and convincing evidence that the evidence highly probably demonstrates that

the claims are invalid.

Here is a list of ways that Cisco

can show that the patent claim was not new or

that the patentee lost the right to claim, to

5 patent the claims: One, an invention is not new

if it was known to or used by others in the

United States before April 2, 2004 for the '709

patent or before January 24, 2005 for the '903

patent. And an invention is known when the

10 information about it was reasonably accessible to

the public on that date.

Two, XpertUniverse has lost its

right that its claimed invention was already

patented anywhere in the world by anyone else

15 more than a year before April 2, 2004, which is

the effective filing date of the application for

the '709 or more than a year before January 24,

2005, which is the effective filing date of the

application for the '903 patent.

20 An invention was patented by another

21 if the other patent describes the same invention

22 claimed by XpertUniverse to a person having

23 ordinary skill in the technology.

24 Three, XpertUniverse has lost its

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right if the claimed invention was publicly used,
sold, or offered for sale in the United States
more than one year before April 2, 2004 for the
'709 patent or more than one year before January
5 24, 2005 for the '903 patent. An invention was
publicly used when it was either accessible to
the public or commercially exploited. An
invention was sold or offered for sale when it
was offered commercially and what was offered was
10 ready to be patented. That is, a description to
one having ordinary skill in the field of the
technology could have made and used the claimed
invention even if it was not yet reduced to
practice.

15 Four, an invention is not new if it
was described in the published patent application
filed by another in the United States before
April 2, 2004 for the '709 patent or before
January 24, 2005 for the '903 patent.

20 And five, an invention is not new if

21 the claimed invention was described in a patent
22 granted on an application for patent by another
23 filed in the United States and the application
24 was filed before April 2, 2004 for the '709

patent or before January 24, 2005 for the '903
patent.

Now, even though an invention may
not have been identically disclosed or described
5 before it was made by an inventor, in order to be
patentable, the invention must also not have been
obvious to a person of ordinary skill in the
field of technology of the patent at the time the
invention was made. Cisco may establish that a
10 patent claim is invalid by showing by clear and
convincing evidence that the claimed invention
would have been obvious to persons having
ordinary skill in the art at the time the
invention was made in the field of expert
15 location collaboration technology.

In determining whether a claimed
invention is obvious, you must consider the level
of ordinary skill in the field of expert location
collaboration technology that someone would have
20 at the time the claimed invention was made, the
21 scope and content of the prior art and any
22 differences between the prior art and the claimed
23 invention.

24 Keep in mind that the existence of

each and every element of the claimed invention in the prior art does not necessarily prove obviousness. Most, if not all, inventions rely on building blocks of prior art.

5 In considering whether a claimed invention is obvious, you may, but are not required to find obviousness if you find that at the time of the claimed invention, there was a reason that would have prompted a person having
10 ordinary skill in the field of expert location and collaboration technology to combine the known elements in a way the claimed invention does, taking into account such factors as whether the claimed invention was merely the predictable
15 result of using prior art elements according to their known functions, whether the claimed invention provides an obvious solution to a known problem in the relevant field, whether the prior art teaches or suggests a desirability to combine
20 elements claimed in the invention, whether the prior art teaches a way from combining the elements in the claimed invention, whether it would have been obvious to try the combination of
24 elements such as when there is a design need or

market pressure to solve a problem, there are a finite number of identified predictable solutions, and whether the change resulted more from design incentives or other market forces.

5 To find that prior art rendered the invention obvious, you must find that the prior art provided a reasonable expectation of success. Obvious to try is not sufficient in unpredictable technologies.

10 In determining whether the claimed invention is obvious, consider each claim separately. Do not use hindsight.

 That is, consider only what was known at the time of the invention. In making
15 these assessments, you should take into account any objective evidence sometimes called secondary considerations that may have existed at the time of the invention, and afterwards that may shed light on the obviousness or not of the claimed
20 invention, such as:

21 whether the invention was
22 commercially successful as a result of the merits
23 of the claimed invention (rather than the result
24 of the design need or market pressure,

advertising or similar activities;.

Whether the invention satisfied a
long-felt need;

Whether others had tried and failed
5 to make the invention;

Whether others invented the
invention in roughly the same time;

Whether others copied the
invention;

10 Whether there were changes or
related technologies or market needs
contemporaneous with the invention;

Whether the invention achieved
unexpected results;

15 Whether others in the field praised
the invention;

Whether persons having ordinary
skill in the art in the invention expressed
surprise or disbelief regarding the invention;

20 Whether others sought or obtained
rights to the patent from the patentholder;

21
22 And whether the inventor proceeded
23 contrary to accepted wisdom in the field.

24 The presence or absence of any of

these factors is not necessarily determinative.

In considering whether the claimed invention was obvious, you must first determine the scope and content of the prior art. The scope and content of prior art in deciding whether the invention was obvious includes prior art in the same field as the claimed invention, regardless of the problem addressed by the item of reference. And prior art from different fields that a person of ordinary skill in the art using common sense might combine, if familiar, so as to solve the problem by fitting together the pieces of a puzzle.

When a party attacking the validity of a patent relies on prior art, which was specifically considered by the examiner during the prosecution of the application leading to the issuance of the patent, that party bears the burden of overcoming the deference due a qualified government agency, official presumed to have performed his or her job.

In deciding what the level of ordinary skill in the field of call center technology is, you should consider all the

evidence introduced at trial including, but not limited to the levels of education, experience of the inventor and other persons actively working in the field, the types of problems encountered in the field, prior art solutions to those problems, rapidity within which innovations are made and sophistication of the technology.

If you find that Cisco infringed Claim 5 of the '709 patent or Claim 12 of the '903 patent, you must then consider what amount of damages to award to XpertUniverse.

I will now instruct you about the measure of damages. By instructing you on damages, I am not suggesting which party should win this case on any issue.

The damages you award must be adequate to compensate XpertUniverse for the infringement. They are not meant to punish an infringer. Your damages awards, if you reach this issue, should put XpertUniverse in approximately the same financial position that it would have been in had the infringement not occurred.

XpertUniverse has the burden to

establish the amount of damages by a
preponderance of the evidence. In other words,
you should award only those damages that
XpertUniverse establishes that it more likely
5 than not suffered.

In this case, XpertUniverse seeks a
reasonable royalty. A reasonable royalty is
defined as the amount of money XpertUniverse and
Cisco would have agreed upon as a fee for use of
10 the invention at the time prior to when
infringement began.

I'll give you more detailed
instructions regarding damages shortly. Note,
however, that XpertUniverse is entitled to
15 recover no less than a reasonable royalty for
each infringing sale or use.

Now, if you said, fine, that
XpertUniverse has established infringement,
XpertUniverse is entitled at least -- to at least
20 a reasonable royalty to compensate it for that
infringement. You must award XpertUniverse a
reasonable royalty for all infringing sales.

A royalty is a payment made to a
24 patentholder in exchange for the right to make,

use or sell the claimed invention. A reasonable royalty is the amount of royalty payment that XpertUniverse and Cisco would have agreed to in a hypothetical negotiation taking place at a time prior to when the infringement first began.

In considering this hypothetical negotiation, you should focus on what the expectations of XpertUniverse and Cisco would have been had they entered into an agreement at that time and had they acted reasonably in their negotiations.

In determining this, you must assume that both parties believed the patent was valid and infringed, and XpertUniverse were willing to enter into an agreement. A reasonable royalty you determine must be a royalty that would have resulted from the hypothetical negotiation and not simply a royalty either party would have preferred.

Evidence of things that happened after the infringement first began can be considered in evaluating the reasonable royalty only to the extent that the evidence aids in assessing what royalty would have resulted from the hypothetical

negotiation.

Although the evidence of the actual profits of the alleged infringer made may be used to determine the anticipated profit at the time of the hypothetical negotiation, the royalty may not be limited or increased based on the actual profits the alleged infringer made.

In determining the reasonable royalty, you should consider all the facts known and available to the parties at the time the infringement began. Some of the kinds of factors that you may consider in making your determination are, the royalties received by the patentee for the licensing of the patent-in-suit providing or tending to prove and establish royalty.

The rates paid by the licensee for the use of other patents comparable to the patents-in-suit. The nature and scope of the license as exclusive or non-exclusive or as restricted or non-restricted in terms of territory or with respect to whom the manufactured product may be sold.

The licensor's established policy

and marking program to maintain his or her patent monopoly by not licensing others, use the invention or by granting licenses under special conditions to design to preserve that monopoly.

5 The commercial relationship between the licensor and the licensee, such as whether they are competitors in the same territory, the same line of business, or whether they are inventor and promoter.

10 The effect of selling the patented specialty and promoting sales of other products of the licensee and existing value of the invention to the licensor (an) as a generator of sales of its non-patented items and the extent of
15 such derivative or convoyed sales.

 The duration of the patent and the term of the license, the established profitability of the product made under the patents, its commercial success, and its current
20 popularity. The utility and advantages of the patented property under the old modes or devices,
21 if any, that had been used for working out similar results. The nature of the patented
22 invention, the character of the commercial
23
24

embodiment of it as owed and produced by the
licensor and the benefits to those who have used
the invention. The extent to which an infringer
has made use of the invention and any evidence
5 probative of the value of that use. The portion
of the profit or of the selling price that may be
customary in a particular business or in
comparable business to allow for the use or of
the invention or analogous inventions. The
10 portion of the realizable profits that should be
credited to the invention as distinguished from
non-patented elements, the manufacturing process,
business risks, or significant features or
improvements added by the infringer.

15 The opinion and testimony of
qualified experts, the amount that a licensor
such as the patentee and the licensee, such as
the infringer, would have agreed upon at the time
the infringement began if both had been
20 reasonably and voluntarily trying to reach an
21 agreement. That is, the amount which approved
22 licensee who desired as a business proposition to
23 obtain a license to manufacture and sell a
24 particular article embodying the patented

invention would have been willing to pay the
royalty and yet be able to make a reasonable
profit and which amount would have been
acceptable by approved patentee who is willing to
5 grant a license.

No one factor is dispositive and you
did and should consider the evidence that has
been presented to you in this case on each of
these factors. You may also consider any other
10 factors which, in your mind, would increase or
decrease the royalty the infringer would have
been willing to pay and the patent holder would
have been willing to accept, acting as normally
prudent businesspeople.

15 The final factor establishes the
framework which you should use in determining the
reasonable royalty. That is, the payment that
would have resulted from a negotiation between
the patentholder and the infringer and taking
20 place in the time prior to when the infringement
21 began. (In)

22 In determining the amount of
23 damages, you must determine when the damages
24 began. If you find that the '709 or '903 patents

were granted before the infringing activity began, damages should be calculated as of the date you determine that the infringement began.

If you find that the '709 or '903 patents were granted after the infringing activity began, damages should be calculated as of the date the patent issued.

I have about three more pages. I'm going to give -- they have to do with your deliberations. I'm going to give them to you after the attorneys have done their closing argument.

So I appreciate your attention during the last 45 minutes. We're going to take a short break so you can get re-invigorated for the closing arguments. So I'd like to get you back here in about ten minutes. All right? Can we take the jury out, please.

(The jury was excused for a short recess.)

THE COURT: It's amazing to me when you actually read them how much redundancy remains within.

Are there any objections to the

instructions as read?

MR. CANTINE: Not from the
plaintiffs, your Honor.

MR. SCHUMAN: No, your Honor.

5 THE COURT: All right. Do we have
wherever we are with this jury verdict or verdict
form, I guess?

MR. SOBEL: I think we do. We
agreed to some things. We have a few things that
10 we have not agreed on

THE COURT: Well, time has run out.

MR. SOBEL: Yes.

THE COURT: So let's have them.

MR. SOBEL: Well, I will give you a
15 clean red line and perhaps we can just go through
it and tell you the things we've agreed to and
the things that are still --

THE COURT: You know, particularly,
Mr. Cantine, if you like want to leave --

20 MR. CANTINE: Thank you, your Honor.

21 THE COURT: And, Mr. Schuman, you,
22 too, if you want.

23 MR. SCHUMAN: Thank you, your Honor.

24 THE COURT: We'll resolve the case

Without you.

MR. SOBEL: So the first page --

THE COURT: Just hold on a second,
Mr. Sobel. I appreciate what you're citing.

5 All right. I see what number two
is. Who has got the underlined version?

MR. SOBEL: So our version was the
one that was stricken by Cisco.

THE COURT: Okay. So,
10 Mr. Blumenfeld, why is the underlined version
different than the stricken version?

MR. BLUMENFELD: Because like every
other question in the verdict sheet, we think
that it ought to include that XpertUniverse has
15 met its burden of proof on the damages issue.

THE COURT: That's the issue,
whether burden of proof should be in there?

MR. BLUMENFELD: That's the main
issue. We put the burden of proof in there.
20 They just said essentially how much money.

21 THE COURT: I agree. I think it
22 ought to be consistent and I do see preponderance
23 of the evidence, preponderance of the evidence,
24 clear and convincing evidence.

MR. SOBEL: I just want to make one
point. We think that it's repeating the burden
from the elements of the claim already prove that
you require by a preponderance that harm has
5 occurred as a result of the fraud. So to put --

THE COURT: But you do have to prove
the loss by a preponderance of the evidence;
right?

MR. SOBEL: Well, in the element of
10 the claim, you have to prove that it was a --
that the concealment was -- that XpertUniverse
was harmed by a preponderance of the evidence,
and that the concealment was --

THE COURT: All right. Okay. All
15 right. We'll go the with underlined version that
has preponderance of the evidence.

Okay.

MR. SOBEL: Our position was that we
wanted the part that does not have preponderance.

20 THE COURT: Right. I understand.

21 Sorry. I meant -- I'm ruling for what
22 Mr. Blumenfeld said.

23 MR. SOBEL: I just wanted to make
24 sure I understand something.

THE COURT: Yes. Okay.

Infringement of the patents, but I thought
virtual --

MR. SOBEL: Virtual Expert

5 Management, we -- we removed it from the damages
portion because it was, based on their
representation, the Virtual Expert Management had
no sales. We think there has been evidence at
trial that proved that Virtual Expert Management
10 does infringe because it's -- it uses Expert
Advisor.

THE COURT: Yes. Mr. Blumenfeld?

MR. BLUMENFELD: And my
understanding of the evidence that they put in
15 was that Dr. Nourbakhsh testified that Expert
Advisor and Virtual Expert Management were used
together and that was the basis for his
infringement, but it was never a separate Virtual
Expert Management infringes.

20 THE COURT: Well, my recollection
21 is, I thought in the plaintiff's case, yes, there
22 was no mention of Virtual Expert Management. I
23 thought the testimony --

24 MR. SOBEL: Actually --

THE COURT: I thought Mr. Bratic,
for example, said, you know, RemoteXpert, Pulse
and Expert Advisor.

MR. SOBEL: There was no damages of
5 virtual expert -- the representation was they had
no sales (zcheck check.

THE COURT: Right. Right. Okay.
But I guess I don't remember --

MR. SOBEL: And so you might
10 remember, there was an issue at the trial whether
they're still selling actually Virtual Expert
Management and, you know, we've alleged that it's
infringed and we think there's evidence that
supports a finding in the record and that's why
15 we put it in the verdict.

THE COURT: Well, did Dr. Nourbakhsh
say during his testimony that Virtual Expert
Management infringed the patent, because I don't
think he did.

MR. SOBEL: Well, right, but during
20 the --

THE COURT: Okay. All right. That
22 right is enough. I'm not going to ask him
23 about something that he didn't opine infringed.
24

MR. SOBEL: All right.

THE COURT: So I see that probably
takes care of question number two there, too.

MR. BLUMENFELD: On C, your Honor, I
5 think -- I don't know which version you have, but
I think we've agreed that there will be four
questions and the anticipation question will say,
is invalid due to anticipation. The obviousness
question will say, is invalid because.

10 THE COURT: All right. Mr. -- so
Expert Advisor, Mr. Sobel?

MR. SOBEL: Okay. And we just come
to the end, which is the --

THE COURT: All right. So,
15 Mr. Sobel, you heard, I understand, you know,
you're trying to do two things at once, but you
heard what Mr. Blumenfeld said.

MR. SOBEL: About our agreement?
Yes.

20 THE COURT: All right. Okay. Just
21 checking.

22 MR. SOBEL: Yes.

23 THE COURT: So the last one is
24 damages for Cisco's patent infringement. Okay.

Wait. Right. So we got the preponderance of the evidence.

MR. BLUMENFELD: Same issue as with the first question.

5 THE COURT: Okay. So, yes. So I I must be consistent there.

MR. SOBEL: When you have infringement, you should recover. You know --

10 THE COURT: I'm sorry. What are you saying?

MR. SOBEL: When there is infringement, we're entitled to recover.

THE COURT: Yes.

MR. SOBEL: Right?

15 THE COURT: Right.

MR. BLUMENFELD: Right. I think you just told the jury that question here is how much have they proved that they should recover.

THE COURT: Right.

20 MR. SOBEL: Okay. All right. So we're keeping --

21 THE COURT: Yes. Let's go with the
22 underlined version. So get rid of Virtual Expert
23 Management.
24

So, Mr. Rovner, are you with us? I
assume you're the -- I like the idea of one
throat to choke.

MR. DAMSGAARD: A new phrase is
5 born.

MR. SOBEL: I will coordinate
with --

THE COURT: Okay.

MR. ROVNER: I was just going to say
10 in the instructions you just read, it does not
say damages by a preponderance of the evidence,
so I think by putting that in, it's going to be
inconsistent.

MR. BLUMENFELD: I thought you said
15 they had to prove all elements of their case by a
preponderance of the evidence.

THE COURT: Well, I would have
thought that I did, too, but --

MR. ROVNER: But I don't think in
20 the damages section it says preponderance of the
evidence, and I think -- well, I believe that's
21 for a good reason.
22

THE COURT: XpertUniverse has the
23 burden to establish the amount of its damages by
24

a preponderance of the evidence, page 34.

MR. ROVNER: That's what I said.

Okay. If that's in there, then I missed it. I stand corrected.

5 MR. SOBEL: On VR ^ section ^ sex
13, it says, we must prove the amount of damages.
XpertUniverse does not have to prove the exact
amount of damages.

10 THE COURT: Well, right, but that
does not mean -- you have the preponderance, you
have to prove damages. I mean, you know, they're
going to be able to round off. It's not
\$69,146,391, it's 70 million.

MR. SOBEL: Okay.

15 MR. BLUMENFELD: Your Honor, one
last question. I think we have everything done.
One last question. What would you like the title
to be? Just jury verdict form?

20 THE COURT: Yes. That would be
good.

21 MR. SOBEL: Okay.

22 THE COURT: Or, actually, just --

23 MR. BLUMENFELD: Verdict form?

24 THE COURT: Jury verdict.

MR. BLUMENFELD: Jury verdict?

MR. SOBEL: Jury verdict.

THE COURT: Jury verdict form.

Let's spend a lot of billable hours working on
5 this.

Okay. So we got that under way.

And hopefully at the next break, after Mr.
Cantine is finished, we'll have -- there will be
a clean copy. Right?

10 MR. ROVNER: Yes, that's fine.

THE COURT: Okay. Let me just -- I
you, you know, I've got about -- I'm just going
to go out for two or three minutes. Okay?

MR. SOBEL: Yes.

15 THE COURT: Thank you.

(Short recess taken.)

- - -

(Proceedings resumed after the short
recess.)

20 THE COURT: Are you prepared, Mr.

21 Cantine?

22 MR. CANTINE: I am.

23 THE COURT: All right. Let's go get
24 the jury.

(The jury entered the courtroom and took their seats in the box.)

THE COURT: Members of the Jury, welcome back.

5 Everyone be seated. Mr. Cantine?

MR. CANTINE: May it please the Court. Well, we're almost over. I want to thank you for your patience. I want to thank you for your diligence. You've been a very attentive jury. I couldn't ask for anything more.

I also want to thank you on behalf of my client, XpertUniverse and Victor Friedman. You met them. You met him. It has been an honor representing him. It has been a long road, but we're finally here. And this is part of something important. This is still one of the only few places in the world where a small company like XpertUniverse can bring its claim against a much bigger competitor, like Cisco.

20 And we've been together for about a week-and-a-half and you heard a lot of testimony. You've seen a lot of evidence. My job is to try to connect the dots for you a little bit here.

24 I want to go back over what I told

you in the opening, what I promised you was going to come in, and I want to show you that we proved our case.

Now, XpertUniverse was built on vision. You heard that from Mr. Friedman. You heard it from Ms. Eiss. You heard it from John Steinhoff. They started out trying to do something in the education market. They wanted to help kids, but, unfortunately, the money wasn't there, so they had to switch to the corporate side.

And they developed technology. They developed technology that companies like Cisco didn't have, valuable technology. And Cisco came knocking on our door.

Now, it wasn't because -- it wasn't out of goodness of their hearts. All right. It's because they wanted something. They wanted the technology my client had developed. They wanted to make money with it.

As Mr. Hernandez himself told you yesterday, Cisco saw the XpertUniverse technology as a driver of revenue. It was going to make Cisco money.

So who came knocking on that door?

Do you remember the name Laurent Philonenko? He was the former CEO of Genesys. He was the one that convinced XpertUniverse to abandon Genesys and come work with Cisco. And he was the head of Cisco's Call Center Business Unit, the CCBU. You've seen that acronym a lot. He was the boss. That's what Mr. Hernandez called him yesterday.

And Cisco told you during opening statements, they told you Mr. Philonenko was going to be here. They said Mr. Laurent Philonenko, you will hear from him. He will be here at trial. But he never showed up, did he? Laurent Philonenko, head of the CCBU. Mr.

Hernandez's boss. Someone copied on a lot of the e-mails you've seen. Never showed up in the last-week-and-a-half.

Now, maybe he has got a good reason.

I don't know. But he never came here to Wilmington to tell you what happened and what happened on his watch.

Now, you heard from Mr. Friedman. He talked about that first meeting, that phone call, the flying out to San Francisco to meet

with Mr. Philonenko, and how Mr. Philonenko
promised him that he would support the
partnership. And Mr. Friedman trusted
Mr. Philonenko. He believed in him. And the
5 parties signed that nondisclosure agreement. We
showed you that, that secrecy agreement that I
talked about in the opening.

And XpertUniverse and Cisco worked
together for two-and-a-half years. There was no
10 dispute about that, two-and-a-half years.

Now, you heard a lot of argument
from Cisco suggesting, we had nothing of value.
Vaporware, it was all made up. And I asked you
when we were here a week-and-a-half ago to use
15 your common sense. Does it make any sense to you
that a company Cisco's size, one of the largest
technology companies in the world, would come
work with XpertUniverse for two-and-a-half years
if they had nothing to offer? It just does not
20 make any sense.

What also doesn't make any sense is
21 why were they so worried that we were going to go
22 back and work with Genesys? Remember, Genesys
23 was their big competitor, but they didn't want us
24

going back to work for Genesys. Why? Because we had something of value. They had something of value that Genesys might use to their detriment.

Now, Mr. Friedman and Mr. Steinhoff, they told you all about how the original platform was built on that Genesys component, that router thing. You heard a lot about that. And they told you about how that Genesys-based integration was built and done, how they are weeks away from going to market with Genesys. They had that product finished. But Mr. Philonenko, he's the one that convinced him to say, no, don't work with Genesys. Come work with me over at Cisco. We're bigger. We're better. I will take care of you.

Now, they promised Mr. Philonenko would come here and tell you what happened, but he didn't show up. Instead, we got Mr. Hernandez.

So what did we learn from him yesterday? There are two important things I want you to remember, a few things we learned from Mr. Hernandez yesterday. They're very important.

Number one, he finally admitted that

he never told XpertUniverse about the denial of SolutionsPlus in April of 2006. And another important thing. He finally admitted that the Governance Council still never went back and voted again on XpertUniverse, not once. They voted in April of 2006, outcome denied. That Governance Council never met again as it relates to XpertUniverse. That's what Mr. Hernandez told us yesterday.

Now, he told you about all of these times he allegedly went back to try to convince Carl WEES see to get XpertUniverse into that program, but, again, he admitted here, yesterday, that Governance Council never met again for XpertUniverse.

So why didn't anybody tell XpertUniverse about this denial? Why didn't anybody tell XpertUniverse the Governance Council never went back and met again? Because they did not want XpertUniverse to go back and work with

Genesys. It's as simple as that. That's what all the evidence has shown.

Mr. Philonenko, he came from Genesys. He knew what Genesys had. He knew what

Genesys was capable of. And Cisco was willing to do anything to keep my client from going back and working with Genesys, their big competitor. And that directive came from Mr. Philonenko early on in the relationship.

I'm going to show you PTX-428. That's Plaintiff's Exhibit 428. And you're going to have all of these exhibits back with you in the jury room, but I will try to walk you through them quickly.

And this is an e-mail, March 2005, Laurent Philonenko to Ken Jordan, John Hernandez and others.

And what does he say? He says, at this juncture, the most important is to show something and get Genesys out of the picture. The most important, get Genesys out of the picture.

Cisco wanted us for themselves and if they couldn't have it, they didn't want anybody else to have it either. And the companies work together for two-and-a-half years and the evidence has shown, my client finished that integration. They finished it in November of 2006. That's what Mr. Friedman told you and

that's what Ms. Eiss told you.

Now let's take a look at all the people XpertUniverse dealt with over that two-and-a-half year period. These are all the people that are copied on the various e-mails you've been seeing over the last-week-and-a-half. Not a single one of them, not a single one ever stepped up to the plate and told my client they had been denied SolutionsPlus back in April of 2006. Not a single one stepped up to the plate and said, oh, and by the way, that Governance Council, they never met again. They never even considered any application for XpertUniverse.

But before we get to them, let's talk about some of the people we did hear from. Remember Carl WEES see. He's the one that sat on the Governance Council. He was one of the ones I told you in the beginning was one of the most important people in this case. But Cisco didn't bring him here to Wilmington either, but we showed you his deposition testimony. And I don't know if you remember, but we asked him, we asked him specifically, knowing what you know now, do you think someone should have told XpertUniverse?

Do you think you should have told XpertUniverse?

Let's hear what he has to say.

(Videotaped deposition excerpt played
as follows.)

5 "Question: So would you expect it
to be an important consideration for a small
company trying to partner with Cisco to to be
given entry into the SolutionsPlus program?

 "Answer: Many companies probably
10 thought it was a benefit to be in that program.

 "Question: So it would have been
important to XpertUniverse, too, right?

 "Answer: I would assume. I just
don't know.

15 "Question: If you were in
XpertUniverse's position, would you want to
know the outcome of that Governance Council
meeting?

 "Answer: Yes."

20 (End of videotaped deposition

21 excerpt).

22 MR. CANTINE: I agree with him. I
23 would have wanted to know. Put yourself in
24 XpertUniverse's shoes. Wouldn't you have wanted

to know, too?

It's about doing the right thing,
right, when no one is looking. That's what we
talked about a week-and-a-half ago.

5 Now, you also heard from Mr.
Hernandez yesterday about how he allegedly kept
going back to Mr. WEES see, trying to convince
him to get XpertUniverse into that SolutionsPlus
program. And I don't know if you remember, but
10 he talked about two things. He talked about
Citibank and Fed-Ex. Those were the two big
quote, unquote "lighthouse accounts" he kept
talking about and how he kept going back to
Mr. WEES EE on those, trying to get XpertUniverse
15 over the finish line. Let's see what Mr. WEES EE
had to say about that.

(Videotaped deposition excerpt
played as follows.)

"Question: So we've handed you what
20 we marked as Plaintiff's Exhibit 181. Please
21 take a moment to review that.

22 Answer: Okay.

23 "Question: And this is an e-mail
24 you received from Mr. Hernandez on October 4th,

2006, correct?

"Answer: It's dated that, yes.

"Question: You don't have any reach
to believe you didn't receive it, do you?

5 "Answer: No.

"Question: And the subject begins
XpertUniverse. So this is an e-mail from Mr.
Hernandez to you about six after XpertUniverse
had been denied SolutionsPlus, right?

10 "Answer: Yes. Well, six months
after the meeting took place.

"Question: Okay. So this is
roughly six months later, Mr. Hernandez is -- is
coming back to you with regard to XpertUniverse,
15 right?

"Answer: Yes.

"Question: Okay. And this says,
Carl, unfortunately, we did not get a chance to
finish AIG conversation on XU last week. You had
20 indicated your biggest concern was around

21 near-term and long-term plans in this space. Do
22 you see that?

23 "Answer: Yes.

24 "Question: Mr. Hernandez continues,

our intentions are as follows:

Number one, use XU for routing into the
enterprise and building skill set taxonomies
outside the call center over the next few years,
5 i.e., Citi, AIG, IBM, Fed-Ex.

Do you see that?

"Answer: Yes, I do.

"Question: Do you recall any
discussions with Mr. Hernandez with regard to
10 Citibank, AIG, IBM or Fed-Ex?

"Answer: No, I do not.

(End of videotape deposition
excerpt.)

MR. CANTINE: He couldn't even
15 remember. I mean, Mr. Hernandez was in here
yesterday, touting about how he went back to Carl
WOOEZ all those times about Citibank, about
Fed-Ex. Mr. WOOEZ, he couldn't even remember.

Now, we also had Mr. Bilanji
20 Sundara. He's another one I told you was one of
21 the most important witnesses in this case. He's
22 the one that made the presentation to the
23 Governance Council on behalf of XpertUniverse,
24 but he didn't come here either to tell us his

side of the story, but we have his video as well.

And I want to remind you what he had to say. When we asked him whether or not he told XpertUniverse about the denial, he said he could only tell them if his manager said it was okay. And his manager never did.

Let's play that one, please, Dave.

(Videotaped deposition excerpt played as follows.)

10 "Question: After reading this e-mail, did you inform XU that they had been rejected by the Governance Council?

"Answer: No, I did not.

15 "Question: Did you ever inform XU that they had been rejected by the Governance Council?

"Answer: No.

"Question: Why not?

20 "Answer: Because I did not receive any specific instructions from my manager.

21 "Question: Did you want to tell XU about the decision?

23 "Answer: Only if my manager had
24 instructed me to do so.

"Question: Were you ambivalent
otherwise?

"Answer: Without a specific
direction, I would not have gone and informed XU.

5 "Question: Do you think the fact
that they had been rejected by the Governance
Council would have been important information to
XU?

"Answer: Again, I was not -- I
10 mean, it was a decision made in a council, and
without the instructions from my manager or the
entire chain of Cisco management, I would not
have gone ahead and informed XU by myself.

"It could have been an important
15 answer for XU, but I would not have informed them
without, you know, getting the proper directions
from my manager.

"Question: And what makes you it
that it could have been an important piece of
20 information for XU?

"Answer: I guess they were
21 cooperating with us in the SolutionsPlus
22 agreement and the fact that it was a denial from
23 the Governance Council would perhaps have been an
24

important thing to know about."

(End of videotaped deposition
excerpt).

MR. CANTINE: Now, those are Cisco's
5 own witnesses. You have Mr. WOOEZ EE, the head
of the Governance Council saying, if I was in
XU's shoes, I would want to know. You've got
Mr. Sundara. He knew it to XpertUniverse.
That's what he just told you there. But they
10 never said anything, did they?

Now, Mr. Hernandez was here
yesterday. He was also suggesting that if the
Governance Council denied an application, it was
no big deal. He could just take it back to them
15 again.

Well, we also asked Mr. Sundara
about that. And he was the one responsible for
making the presentation to the Governance
Council. So he knew what was happening in those
20 types of situations.

21 Let me show you what he had to say.

22 "Question: In the SolutionsPlus
23 approval process, if a product is rejected by the
24 Governance Council, does that mean that no

further work will be conducted with regard to
that product?

"Answer: Looking at the flow chart,
that was my assumption.

5 Right? So Mr. Hernandez is saying,
oh, we just keep looping back, looping back.
Well, Mr. Sundara, he was the one in charge of
it. He's saying that's not the way it worked.

Now, you've seen a lot of e-mails
10 among many Cisco employees ESHGS where they
started calling XpertUniverse a competitor. And
Mr. Hernandez, he had an explanation for that,
too, yesterday, didn't he? He said, I don't
remember ever calling him a competitor. All
15 those people must be wrong. All those people on
those e-mails that are attributing it to him and
him calling XpertUniverse a XET torques they must
all be wrong.

I don't know if you remember Mr. HAD
20 even. You saw him on video deposition. Let's
21 take a look at what he had to say about that.

22 (Videotaped deposition played as
23 follows).

24 "Question: All right. We were

discussing earlier how when you found out from
Mr. Hernandez that CCBU was developing competing
product. What was -- answer: No, I don't
believe -- I don't believe I said that.

5 "Question: Okay. What did you say
about that?

 "Answer: He answer: He said -- as
I recall his exact words is XpertUniverse is a
competing -- is a competitor, and we have filed
10 some patents or patent -- I don't remember if it
was singular or plural -- and we'll be
introducing some new features and functions in
the future, or words to that effect.

 (End of video clip).

15 MR. CANTINE: Another Cisco
employee. You heard it from him.

 Now, again, it's common sense. If
XpertUniverse did not have anything of value, why
didn't Cisco simply tell them about the denial?
20 Just tell them. You've been denied. Go make
21 your own decision. Right?

22 It's a big company; right? They're
23 big boys. They can handle it. But they never
24 told him. They DNTS give him that opportunity to

make their own decision. They keep coming in here saying, we've got nothing of value. Do you remember Mr. Cop PEL? He was the former Citibank executive that came in and testified here. He was an independent guy. He had no skin in this game, none at all.

He came down here on his own dime from New York because LEE wanted to tell you what happened. He wanted to tell you his story about his involvement with XpertUniverse. And this is a gentleman with 20 years of experience at Citibank. He was the senior vice president and chief information officer of the global consumer group. That's a \$15 billion a year business. And he told you, he did. He told you. Citibank did their own due diligence on XpertUniverse. A deep dive, I think he called it.

And he told you about how impressed he was, about how impressed he and his colleagues were about the XpertUniverse technology. And he told you about how he thought that technology would provide Citibank an opportunity to distinguish itself from its competitors. And, again, Cisco has been making a whole S T I N K

about some allegation that we didn't have a
finished product. You've heard that over and
over. But do you remember what Mr. Cop PEL said
about that? He didn't care. Not only did he not
care, he thought it was a benefit. Why would I
want to buy some finished product from
XpertUniverse, so they could go sell it to
everybody else? I'm happy. That was a good
thing it wasn't finished because we could tailor
it to our needs.

Citibank could tailor it to their
needs and distinguish TLEMSZ from their
competitors. So he viewed that as a benefit.

He also talked about the fact that
he didn't care whether or not XpertUniverse
partnered with IBM or Cisco, whether they had a
Genesys router, Cisco router. He didn't care.
He just wanted the technology. And why is that
important? Because XpertUniverse had options.
They didn't have to partner with these guys.

They had been told the truth back in April 2006
(if they), they could have partnered with IBM and
they could have gone in and been in business with
Citibank. That's what Mr. Cop PEL told you.

Again, he has got no stake in this.

He came down here on his own to tell you that.

And XpertUniverse had a lot of options. Can we put that slide up, Dave?

5 This is what the evidence has shown.

If they had simply told him the truth Xper in April of 2006, could have partnered with IBM, could have partnered with FLEN necessity JIS, or they could have taken that Genesys based platform and gone shopping it around to others.

Mr. Wagner was here this morning.

That's Cisco's own damages expert. He agr with me. And he agreed with me that XpertUniverse had options back in April 2006.

15 And Citibank wasn't the only one that saw value in XpertUniverse's technology. You heard from both Mr. Friedman and Mr. Bratic, our damages expert, about how IBM did its own diligence. They did their due diligence on didtUniverse as well.

21 Remember what they talked about?

22 They talked about the fact that IBM considered
23 giving XpertUniverse a \$20 million St \$20 million
24 for one year's standstill, they called it,

essentially. They wanted that exclusive right
for a year, IBM did. They considered paying EK
PERT universe 20 million bucks for one year.

Let's talk about the patents. The
5 patents -- they're the pillar of the company.
Mr. Steinhoff was here. He described for you
what they're all about, what they were trying to
do, what they were trying to solve. I thought he
did a pretty good job.

10 And then you heard from Dr.
Nourbakhsh. I mean, this is a gentleman plan
with Bachelor's, Master's and Ph.D. from Stanford
University in computer science. Apparently, the
professor at KARN necessity GEE melon. And he
15 also explained to you the technology. And he
told you about how those patents were infringed.
He told you how the patent, the products that
Cisco came out with, had they infringed
XpertUniverse's patents. (How they) and it all
20 began with this first one, Expert Advisor.

21 That's the first product that Cisco came out
22 with.

23 Do you remember those code names,
24 Samba. Code name TA ^ repair ^ rare row. It was

those secret names Cisco was using internally to talk about this product that became Expert Advisor.

And you remember this name Ken

5 Jordan. Mr. Jordan was one of the lead architects on that Expert Advisor product, on Cisco's Expert Advisor product. It's the same Ken Jordan that spent 70 percent of his time with XpertUniverse. Do you remember that's what Mr.
10 Lepore told us? It's the same Ken Jordan that was the main go between between XpertUniverse and Cisco. The same Ken Jordan that received all that information from XpertUniverse and posted it on that life link inside Cisco's website so that
15 everybody could get access to it.

The same Ken Jordan that ended up as the named inventor on two Cisco patent applications that were filed right at the same time we thought were our partner when they were
20 our partner.

21 And what product were those two patents intended to cover? You heard it from Mr.
22 Jordan himself: Expert Advisor. And Expert
23 Advisor led to, you heard about Virtual Expert

Management and Remote Expert. Essentially every one of those products is infected with XpertUniverse information that came through Ken Jordan.

5 Now, Cisco's coming in here and talking about Pulse. They're like pulse like it came from another universe, that Mr. Jordan didn't have anything to do with Pulse.

10 They are acting like it came from a different company. It's all one company.

 They never told us how many people had access to that Livelink. They said they couldn't figure it out.

15 Now, the validity of the patents, the judge instructed you on the law. It gets a little deep.

20 But at bottom, I mean, Cisco coming in here telling you, Hey, we're trying to sell you snow in the winter. It's all about common sense.

21 During the two and a half years we
22 worked together, there's not one email they ever
23 showed you saying, Hey, your technology is
24 worthless. But that's what they're doing with

the patents. They want you to come in here and just cancel them. Get rid of them. They're not worth the paper they're printed on. That's what they're telling you.

5 But it's a common sense. There's no evidence in the record they ever said that before, not before this litigation. IBM thought XpertUniverse's technology was important.

Citibank thought it was important.
10 Important and valuable.

But now under the light of litigation, Cisco just comes in here and says, Yeah, just cancel those things. They're worthless. They're old. They're known.

15 Think back to what Mr. Koeppel told you. All right. The independent guy.

He saw a lot of value in that technology. He told you about how Citibank Citigroup, whatever you want to call them, they
20 saw tremendous value in XpertUniverse's

21 technology.

22 And he told you about all the due
23 diligence that Citibank did and how important --
24 he told you himself how important that whole

SolutionsPlus thing was to him. Remember when he talked about one big neck to choke? Right.

He knew he was getting in bed with XpertUniverse, which is a small company, so he wanted a big partner by their side. He didn't care if it was Cisco or IBM.

But he saw value there. And he thought he knew -- he told you how important that SolutionsPlus arrangement was to him even because it indicated to him a level of trust. A partnership.

And he also told you about a conversation he had with John Hernandez.

Mr. Hernandez told him, Don't worry.

XpertUniverse is our partner. We've got no intentions of coming out with anything on our own. We're joined at the hip.

And the timing is critical.

Remember, Cisco denies SolutionsPlus in April of 2006. Citibank pilot came later.

Cisco had to stall XpertUniverse because it was critical to them to keep Genesys out of Citibank. We'll look at those emails again, I promise you. We'll try to go quick

through them.

But let's go back. Now, like I said
in the beginning, all the evidence, all the
evidence we're going to look at, all the evidence
5 of concealment, all the evidence of fraud comes
from their own records.

Now, Mr. Hernandez was here trying
to explain away a few of them yesterday, but he
can't talk -- he can't talk his way out of all of
10 them. Let's take a look at them again.

This is the first one. This is the
quid pro pro that we talked about. Right.

This is the deal with Mr. Hernandez
to XpertUniverse December 17th, 2005. Remove
15 Genesys and we'll move on SolutionsPlus. That's
the deal.

Ms. Eiss told you about it.

Mr. Hernandez told you about it.

Remember Ms. Eiss talked to you
20 about how this conversation -- it's right before
21 the holidays. She was going through Newark
22 Airport, got the call from John, John Hernandez.
23 Dropped everything. Took the call, the call
24 they've been waiting for.

She told you she immediately called
Mr. Friedman and how excited they were and how
they put all their resources behind us based on
this representations, based on this promise,
5 based on the trust.

But we'll -- go to the next one,
please, David.

We know now that at least one
presentation was made to the Governance Council.
10 Mr. Sundara told us about that.

But here's the outcome: I mean,
it's pretty simple. It says, Outcome denied.

It doesn't say outcome questions.
It doesn't say outcome concerns. It says outcome
15 denied.

Next one, please. We've got a week
later Mr. Sundara, the one that made the
presentation, writing to his boss, Ross Daniels.

You've seen this one before. What
20 am I supposed to do? I've got weekly meetings

21 with these guys at XpertUniverse. That's what
22 he's saying.

23 But look at the last bullet item he
24 said. He said, Okay. Look, we've denied them

SolutionsPlus. What are we going to do now?

There's the risk of Genesys buying out

XpertUniverse, and then we've lost everything.

You have Mr. Philonenko worrying

5 about Genesys back in March 2005. You've got Mr.

Sundara reporting up the chain here, May of 2006,

What about Genesys? What are we going to do

about Genesys? If we don't do something with

XpertUniverse, what's going to happen with

10 Genesys?

Next one, please.

So you'll see this one come up.

We're going to start keeping track of everybody

that is on these emails for you.

15 Next one, please.

So, Mr. Daniels, he responds. He

forwards Mr. Sundara's email off to his boss,

John Hernandez. And he says, Any thoughts?

Remember, he's got to respond to

20 Balaji Sundara, but he's reporting up the chain

21 to his boss saying, What am I supposed to do?

22 Any thoughts?

23 Right now everything's sort of

24 hanging in the wind. XpertUniverse still does

not know about last week's decision.

Still does not know. Why not?

A week's gone by. How come nobody's told them?

5 So it's their own record. They know we don't know.

Doesn't say, Oh, we told them about some concerns. We told them about some questions. Saying nobody told them about the denial.

10 Mr. Hernandez responds -- next one, please, Dave. Oh, there you go.

Well, Mr. Hernandez, what is his response? He says he spoke to Rob DePinto. He's that big Citibank guy, works for Cisco, but he's in charge of the Citibank accounts.

15 So Mr. Hernandez -- again, remember, they're all worrying about Genesys getting into Citibank. So Mr. Hernandez responds, I spoke to Rob. Obviously, Rob DePinto wasn't happy about

21 it.

22 It says, I'm going to leave it up to him. If he can get the business from Citi, all the better. I could go either way, he says.

He was in here yesterday telling us about how he was such a champion. And here he's saying, I could go either way.

But Mr. DePinto, he agreed to tell
5 no one about this; right? What does that mean?

Mr. DePinto said he understood that meant tell no one about the denial. Don't tell XpertUniverse about the denial of SolutionsPlus.

And he got Mr. Daniels. He responds
10 to Mr. Hernandez that same day.

He says, Okay. Thanks. Thank you very much. I'll tell Mr. Sundara just to stall XpertUniverse, move them along slowly, stall as needed.

15 Meanwhile, XpertUniverse is pouring its heart out, spending its money, trying to do the integration.

Stall them. Don't tell them.

There's no record of Mr. Hernandez
20 writing back to Mr. Daniels saying, Don't do

21 that. That would be wrong. That's not how Cisco treats its partners. There's no evidence of
22 that.
23

24 Now, let's go to June. We're a

month later.

Mr. DePinto starts again, the
Citibank thing is heating up. The pilot. And
what does he write? I don't want them to use
5 Genesys as the back end engine on this pilot.

Again, over Genesys -- concern over
Genesys. We've got to keep Genesys out of
Citibank.

Now, this is three months after
10 they've been denied. Three months after the
April 2006 denial. They haven't told us. They
haven't told anybody from XpertUniverse. But
they're real worried about that Genesys still
getting into Citi.

15 Let's go to the next one, please,
David.

Now, we fast forward. Now, we're
into October. This is five months after they're
denied.

20 We've got Mr. Bartell. We've got to

21 read these from the bottom up; right?

22 And he writes, So CCBU, that's
23 Mr. Hernandez, Mr. Philonenko, that's their
24 business unit, they're not executing on

SolutionsPlus. He writes basically, that's interesting to me because Elizabeth Eiss thinks they are. She still thinks they're moving ahead. This is five months later.

5 I'm sorry, what are we? May, June, July, August, September, October, six months. This is Cisco's own people saying we haven't told them yet.

Whereas Mr. Grove responds, Okay. I
10 don't think we want to broadcast that to XpertUniverse, meaning don't go telling them we haven't told them.

Mr. Bartell right back, again, we don't want to announce what we're doing with
15 XpertUniverse. It's all about stalling. Don't tell them the truth.

And the list grows; right?

So October 10th, Soufiane Hourì,
this is more stalling. It says, We're not
20 actively working with XU. We also haven't told them we stopped working.

22 I mean, come on. This is how you
23 treat your partners?

24 We're in October 2006.

XpertUniverse is pouring its heart and its money
out trying to finish the integration. They're
about a month away, by the way, and what does
this say? This is Cisco's own people saying,
5 We're not really working with them. And by the
way, we haven't gotten around to telling them
yet, either.

And then at the bottom, what does it
say? Gee, they might even be under the
10 impression that we're going forward on
SolutionsPlus.

This is October. So the list grows.

And we get Mr. Daniels and
Mr. Hernandez involved again. The subject is
15 XpertUniverse. All right.

It says, My take is we're not doing
anything, but stalling them. They've been
stalling them since May. This is now October.

And what have we got next? As soon
20 as we commit to Torero, right, code name Torero,
21 we've got enough. We've got enough of our own
22 stuff. We don't need them anymore is what we're
23 saying.

24 So the list grows. This is just

another one.

In May 2006, in order to keep
Genesys out of Citi, it is important we control
this roll out. Keep Genesys out of Citi. Isn't
5 that the theme?

But look at the bottom. He says
significant revenue opportunity. They see dollar
signs in that Citibank account.

But they want to keep the Genesys
10 out of there. The Genesys out of there.

And it continues. We've got the
next one. There we go.

Another one, Mr. DePinto and
Mr. Hernandez. It mentions Harvey Koeppel.
15 That's the gentleman that came down and told you
about what was going on at Citibank.

Read with what it says in the middle
there, for us to keep Genesys out of Citi, it's
important we control this technology roll out.
20 To keep Genesys out. Keep Genesys out.

21 But don't tell XpertUniverse what's
22 going on. Keep stalling them. Don't tell them
23 they've been denied.

24 Go to the next one, please, Dave.

Dave Bartell never heard from him
here. What does he say?

Ooh, this email is confidential to
Cisco until I can learn more. Why? Is that how
5 you treat your partners? It's right there in red
for you.

CCBU, that's Mr. Hernandez's
business unit, considers XpertUniverse a
competitor and is only engaging with them on
10 opportunistic sales. Oh, gee, how nice of them;
right?

Their own records calling us a
competitor when we think we're a partner. And
we're spending all the money, and all the time
15 and all the effort finishing the integration that
they say was so important.

So the list grows. You see it.

These are all the people that have
been copied on the various emails. From April
20 2006 to October 2009, not one of these people

21 wrote an email, picked up the phone, nothing.

22 Stall. Competitor. Don't tell
23 them. Keep Genesys out.

24 Let's go to the next one, please.

And this is where it ends.

January 2007, almost ten months later, Mr. Hernandez finally gets around to telling Victor Friedman that thanks, but no
5 thanks. Sorry, not moving forward.

Now, I don't know if you remember. Mr. Lepore was here. And I asked him -- remember that whole discussion about him testifying on behalf of Cisco; right?

10 He had gone back and he had scoured the records, scoured Cisco's records trying to find any indication, any record that XpertUniverse was told any time before January 2007. He couldn't find any. That's what the
15 evidence shows.

Denied April 2006. First time they got around to telling us, January of 2007.

The judge has instructed you on the law. You'll have those instructions with you.

20 Just think about that ten-month
21 denial. Think about the fact that they knew it
22 was important. A small company, right, pouring
23 their heart and their soul out, spending all
24 their treasure. They knew it was important.

Put yourself in XpertUniverse's shoes. How would you feel? Wouldn't you have wanted to know? Wouldn't you have wanted to know that you'd been denied SolutionsPlus, declared a competitor, been stalled?

Wouldn't it have been the right thing? Remember, we talked about doing the right thing when nobody's looking? Did Cisco do the right thing? I don't think so.

XpertUniverse deserved to know so that they could make their own decisions about what they wanted to do. If they wanted to tell them in April 2006 you've been denied, they could have decided on their own, okay, I'll stick with you guys, or I'm going to go off and work with IBM. Thank you very much. Or I'm going to go work with Genesys. But they didn't give them that chance.

Okay. They made that decision for us and that wasn't their right. That's just wrong. And it's fraud.

Now, let's talk briefly about some of Cisco's defenses. They told you we had no product. That's not true.

They told you we never finished the integration. That's not true.

Victor Friedman told you that. Elizabeth Eiss told you that.

5 Their favorite piece of evidence is two, three emails from this guy, Mike Turillo. That's all they've shown you.

And you heard about Mr. Turillo. You saw a little bit of his deposition testimony.

10 He was a part-time kind of business development guy that came into the office once for an hour every three months. It's what Mr. Friedman told you. He wasn't involved in the technology.

15 He didn't know what was going on under the covers. He didn't work with the architect and the engineers, the Steinhoffs of the world. He came in the office like a fire cracker once every three months for a couple
20 hours.

21 I mean, their favorite e-mail,
22 right, you've seen that one. Remember, that was
23 the one that was written at two in the morning.
24 They never want to show you the bottom part of

that e-mail, but we did, where he says, well,
maybe this is all wrong. Maybe I got it all
wrong, let's talk about it tomorrow.

In the two or three e-mails they
5 keep showing you, take a look at the dates of
them when you get back there. They're all in
like a two, three-week window.

I showed you all the people on their
side. The judge talked about weighing those
10 scales, right, preponderance of the evidence?
The scales tip pretty far in our favor.

The other thing I don't want to tell
you about is Mr. Turillo made an invest. That
directed his company to make that investment
15 about two or three months after all those
e-mails. He put another \$900,000 in the company.
Does that sound like someone that was trying to
sell vaporware?

I mean, that's offensive. In facts,
20 Mr. Turillo testified that he had no involvement
21 in valuing XpertUniverse. Put that up, please,
22 Dave.

23 This is what he said in his sworn
24 testimony.

"Question: Were you personally involved in any attempts in 2006 or 2007 to value XpertUniverse as a business?

"Answer: No.

5 So they wanted to keep showing you these Turillo e-mails saying, wow, he's saying the value is so low, that XpertUniverse is miss managed, it has got no will value. He wasn't around valuing the company. You heard

10 Mr. Friedman tell you, loved him like a brother, but he had a hot head. He sent e-mails out at two in the morning. But three months later, he invested another \$900,000 in the company.

Cisco likes to claim that there's no
15 value because we had no sales. Mr. Cop PEL, that Citibank guy, he told you about that. He gave you his thoughts. Said it didn't matter to him. He liked the fact that XpertUniverse didn't have any sales. That meant he wasn't selling it to
20 his competitors. Do you remember Dr. Chatterjee?

21 I'm losing my days. I don't know if he was
22 yesterday or the day before or what day it is,
23 but he talked about the fact that company he
24 worked for, the time it was sold, remember he

Talked about it being sold to HP,
Hewlett-Packard? They're a big competitor. They
had a \$45 million loss on the books at the time
that company was sold. And Hewlett-Packard
5 bottom them for \$470 million. So don't be fooled
by the no sales equals no value argument you're
going to hear from them.

Now let's talk quickly about that
Governance Council. Mr. Hernandez told us
10 yesterday that the Council had concerns, had
questions. And you heard from Ms. Eiss. She
told you all the work she was trying to do to
overcome those questions, but she was very clear.
There's a fundamental difference between a
15 question and a denial. It's undisputed that no
one from Cisco told anyone from XpertUniverse,
including Ms. Eiss, that the Governance Council
had denied their application in April 2006.

Mr. Hernandez reported, he didn't
20 tell him, he didn't tell Ms. Eiss about the
21 denial. He said they had questions. And she
22 worked day and night preparing numerous
23 presentations to address those questions that the
24 Governance Council allegedly had. You saw all

the e-mails. You saw the PowerPoint presentations.

Mr. Hernandez, he represented to XU that he would take all that work back, all Mrs. Eiss' work, and he would go back to the Governance Council. That's what he told you. But he never did.

He kept saying he'd take another crack, take another attack, I think was the word he used, on the Governance Council, but he never did did, because LEE told you himself yesterday, there never was another Governance Council MEET go for XpertUniverse. And he testified it was his sole discretion as the director of product management to represent XpertUniverse for the Governance Council. He said, yes, I don't need anybody's permission. He said, it's just an informal process. But there was never a second meeting.

He said, there's no schedule. He could have gone back to him at any time, but there was never any other meeting.

He told you that the vast majority of companies had multiple, multiple reviews

through the Governance Council. But
XpertUniverse only got one, in April 2006.

He appointed him as the new product
manager when Mr. Sundara left. You know why? He
5 said it was an exercise in influence. But the
Governance Council never met again.

He took it upon himself, and he
never did anything. Despite all the work that
Elizabeth infringing activity began, damages was
10 doing at his urging, there's no evidence in the
record that any of her work was ever presented to
the Governance Council for a second vote. But he
never told XpertUniverse any of this. Why? The
evidence shows Genesys. Got to keep Genesys out
15 of Citibank.

Cisco's concealment of this
important fact led to the destruction of my
client's company. Now, Mr. Bratic was here. He
told you how to measure damages in a case like
20 this. He told you about that but-for value;

21 right? You take the will VA of the company
22 before the bad act, you compare it to the value
23 of the company after the bad act, and the
24 difference is the damage.

Mr. Wagner was here this morning.

He agreed. He said, yes, that but for thing,
that's what I do in my work, too (HOOIFRP) FL
that's what these guys do. It's an accepted way
5 to measure damages in a case like this.

Mr. Bratic told you about LOU he
determined the value of XpertUniverse in that
April 2006 time frame. Mr. Wagner, their damages
expert, I mean, he came in here today and said
10 it's 0. That's his professional opinion, that my
client was worth 0 in April 2006. Use your
common sense.

Mr. Bratic, he told you about how he
relied on those Standard & Poor's valuation
15 reports and the Duff & Phelps valuation report
(report). Cisco's own expert admitted that's
what these guys do. When you try to value a
company, you use reports like this.

Mr. Bratic told you how he analyzed
20 those reports. He checked them. He investigated
21 them. He tested them. And he told you how it
22 was the best evidence he could come up with of
23 what the value was of XpertUniverse at that time.
24 And we're not going to talk the numbers, but you

heard him.

Counsel for Cisco told you in their opening statement, pay attention to who has been really harmed here. I agree.

5 Cisco's actions destroyed my company, my client's company. And people got emotional here. People lost their jobs. They lost their dreams.

Can you put it up, Dave.

10 That's what we're asking for. We think the evidence shows that a fair measure of damages is at least \$70 million. All I can ask you to do is use your moral compass, use your good judgment (come PAS), use your common sense. We're asking, I'm asking you on behalf of my
15 client to make Cisco pay for the consequences of their acts.

I really appreciate your time.

Thank you.

20 THE COURT: Thank you, Mr. Cantine.

21 So we're going to take a ten-minute
22 break. Then we'll come back and Cisco will
23 present its argument. All right?

24 (The jury was excused for a short

Recess.)

THE COURT: All right. Everyone be
seated. Hopefully, I'm just going to get the
jury verdict here. I can see that basically it's
5 hot off the presses.

MR. ROVNER: We just not have had a
chance to proof it.

THE COURT: No, no, I understand
that. Were you going to -- all right. Well, I'm
10 not going to sit here while you all hold it. I'm
going to take a recess. Contact me when you are
done.

(Short recess taken.)

15

THE COURT: I am not sure that -- we
just need the one copy.

20 MR. ROVNER: Do you want to give
21 each juror a verdict form?

22 THE COURT: I'm not -- well, okay.
23 In any event, I know there's one that we put with
24 a pretty blue backing --

MR. ROVNER: In the end.

THE COURT: -- in my memory of the
way law was practiced 30 years ago.

Okay. Is everybody ready now?

5 MR. SCHUMAN: Yes, Your Honor.

THE COURT: All right. Let's get
the jury in.

And Mr. Cantine, probably I'm just
going to -- I mean, I'll give you like 30
10 seconds, but probably just go to --

MR. CANTINE: I've got nine minutes
left, Your Honor.

THE COURT: What's that?

MR. CANTINE: I have nine minutes
15 left.

THE COURT: You get a 30-second
break.

MR. CANTINE: Oh, all right. I can
talk fast, but not that fast.

20 (Jury entering the courtroom at 3:48
21 p.m.)

22 THE COURT: Ladies and gentlemen,
23 welcome back. Everyone be seated. We're ready
24 to proceed.

Mr. Schuman.

MR. SCHUMAN: Thank you, Your Honor.

Good afternoon, ladies and gentlemen.

And I can't tell you how proud I am
5 to be representing Cisco Systems every time Mr.
Cantine points at me. This is a very good
company with great employees and great products.

And one of those employees is
Mr. Hernandez, who sat here yesterday and told
10 you the whole story, told you everything that
happened as it relates to the issues that the
jury is going to be asked to decide in this case.

In the opening statement, I did say
snippets of emails stitched together by XU's
15 counsel did not accurately represent what
actually happened between Cisco and
XpertUniverse. And now that all the evidence has
come in, hopefully you appreciate that we showed
you what I said.

20 There's lots of white noise going on
in XpertUniverse's case, just like that white
21 noise you hear every time counsel goes up to the
22 side bar and the judge flips that switch.
23

24 There's actually some fairly narrow

issues in this case for the jury to decide. And the Court gave you instructions and those are what you're going to be applying to the facts as they relate to the issues in the case.

5 You heard a lot of names, saw a lot of emails. Balaji Sundara, he left Cisco on May 15th, 2006.

 We're talking about a case where there's alleged concealment between May 2006 and 10 January 2007. An email that he sent in May 4th, May 5th, something he said in his deposition right before he left, that doesn't prove fraudulent concealment.

 Laurent Philonenko, he didn't have 15 to come because what I said in my opening statement was he was going to tell you how he kept pushing XpertUniverse to do that integration. He didn't need to come. Ms. Eiss said that on the stand in her testimony.

20 Furthermore, this is a concealment case. As the jury now knows, the discussions 21 here were between Mr. Hernandez and Ms. Eiss, and 22 I'm going to focus on what Mr. Hernandez and Ms. 23 Eiss said when they were in that witness box 24

explaining to you what actually happened here.

Mr. Koeppel, that's white noise,
also. He didn't come in and say anything about
XpertUniverse's patents or Cisco's products. In
5 fact, the only patent he talked about was his
own.

He thought XpertUniverse's
technology was primitive. That was his word and
he was interested in it because he could apply
10 his patent to what they had built to date.
That's what Mr. Koeppel said.

Mr. Koeppel did not say anything
about concealment. He mentioned SolutionsPlus.

He didn't say anything about the
15 discussions between Mr. Hernandez and Ms. Eiss as
they relate to the issue, the primary issue that
you, the jury, is going to be asked to decide.

Mr. Hayden, the clip of testimony
you saw for the second time, Mr. Hayden did not
20 say anything about the patents. He did not say

anything about the accused Cisco products. He
21 did not say anything about SolutionsPlus or
22 concealment of any decision about XpertUniverse's
23 status in SolutionsPlus. This is all white
24

noise.

Let me summarize the evidence for you on the concealment claim. Cisco did not conceal anything from XpertUniverse.

5 XpertUniverse, as the evidence shows, was fully aware of its status as it relates to SolutionsPlus from April 2006 to January 2007. It was not admitted to the program at that Governance Council meeting that you've
10 heard so much about. That is undisputed.

What is also undisputed is that XpertUniverse knew that fact. They knew they were not admitted at that April 2006 meeting.

And what happened after that? For
15 the eight or nine months, Mr. Hernandez and Ms. Eiss worked together to try and get them admitted.

The fact that subsequent -- the fact that those subsequent efforts to get
20 XpertUniverse admitted to the program were
21 unsuccessful, does not establish that the denial
22 in April 2006 was final. That's the proposition
23 that XpertUniverse is asking you to accept.

24 That all that work that occurred --

these are not alleged emails or alleged approaches to Carl Wiese. These are things that Mr. Hernandez actually did.

You saw the emails. They exist.

5 They're real.

You heard Mr. Hernandez tell the story. All that work building the business case to get XpertUniverse admitted to this program actually happened.

10 And the fact that it didn't succeed does not mean that that April 2006 decision was actually final. It just so happened that those subsequent efforts did not work.

Now, as I said, the fundamental
15 issue that a jury is going to be asked to decide on the concealment claim, and this is jury instruction number 12 you're going to get a packet with the elements of what they have to prove to show concealment. Element Number 2,
20 XpertUniverse did not know of the concealed fact.

21 Ms. Eiss testified on the stand she knew they
22 were not admitted to this program.

23 Rick, can we put up Clip Number 1?

24 This is Ms. Eiss' testimony from

Last week. And what you heard from John Hernandez after he explained that it had been submitted to the Governance Council, and you hadn't been admitted, that he wasn't going to give up and that he was going to try and get this thing in?

Answer: Correct. Yeah, John was absolutely working with us. I never said he wasn't.

I have viewed John as my partner. And I viewed him as committed to getting this thing done because, frankly, XpertSHARE would help John be more successful in CCBU.

All of the emails, all of the phone calls that you heard about from Ms. Eiss and from Mr. Hernandez show you that XpertUniverse was fully apprised not only of the fact that it was not admitted to SolutionsPlus, but everything Mr. Hernandez was doing to build the business case to get them into SolutionsPlus.

July 13th -- sorry. June 13th, 2006, Elizabeth Eiss sent an email to John Hernandez saying, I want to get back on track with our SolutionsPlus agreement.

June 14th, the very next day, John responds immediately and tries to set up a call with Elizabeth. That's not somebody who's trying to conceal anything.

5 July 6th, there was some scheduling difficulties, as you might remember. They were trying to get a call together. People weren't available.

10 July 6th, 2006, Ms. Eiss, Victor Friedman, they have a call and John explains on that call what happened at the Governance Council, and he explains what they need to do to get this thing across the finish line.

15 Those are his words. And he also testified on the stand that when that call happened, the context of that call was they already knew they were not admitted to the program.

20 Of course they knew they weren't admitted. Ms. Eiss was sending an email a month earlier saying, We need to get this thing back on track.

23 July of 2006, Ms. Eiss is working on
24 power-point presentations for John to take to the

Governance Council. You saw those presentations.

We hear these concerns. Getting SolutionsPlus done. That's what those presentations that Ms. Eiss was preparing said.

5 She sent three iterations of those presentations. And in between each of those drafts that she sent over, there were conversations between Mr. Hernandez and Ms. Eiss.

10 Mr. Hernandez gave her feedback, gave her input. Here's what you need to put in here to get this thing across the finish line. He was working with her to get them into SolutionsPlus. He was not concealing anything from her.

15 XpertUniverse in the person of Ms. Eiss knew exactly what XpertUniverse's status was.

20 August 31st, 2006, John tells Ms. Eiss that he has the support of the Cisco IBM Alliance Team. That is him building the business case, getting key constituencies within Cisco to support this, so he could go back to Carl Wiese and the Governance Council and get XpertUniverse across the finish line.

October 4th, you heard

Mr. Hernandez. His focus was on Citigroup.

Citigroup was the lighthouse
account. Citigroup was a major Cisco CCBU
5 customer. It also happened to be somebody that
XpertUniverse was talking with. That's why you
saw Mr. Koepfel here.

Mr. Hernandez did what good
executives do. He saw the synergy and he said,
10 Let's make Citigroup the lighthouse account. And
he went out to Rob DePinto, very senior person
within Cisco.

He was the owner within Cisco of
that Citigroup account to help him build that
15 business case. That was the email that Mr.
Cantine showed you.

That was rob DePinto building --
helping Mr. Hernandez build the business case.

But then what happens in October?
20 The Citigroup pilot still hadn't happened.

21 There are delays internal to
22 Citigroup. It has nothing to do with Cisco. May
23 not have anything to do with XpertUniverse,
24 either.

That pilot doesn't happen. But what happens? An opportunity comes across Mr. Hernandez's desk. FedEx needs something and Cisco needs to find a way to -- excuse me. Cisco needs to find a way to provide that to the other good customer, FedEx.

What does Mr. Hernandez do? He thinks outside the box.

He says, Wait a minute. This may be another opportunity to get XpertUniverse across the finish line.

That one didn't work out. FedEx. There was a meeting. XpertUniverse knew about this opportunity. No concealment.

There was a meeting, a call. XpertUniverse spoke with Cisco. Spoke with FedEx.

Let's figure out if this is a right fit. This was not the right fit.

In the meantime, Mr. Hernandez had went to Mr. Wiese. We saw that email. And what was Mr. Wiese's response? I can support this via SolutionsPlus.

Mr. Hernandez is actively working to

get them into SolutionsPlus and keeping
XpertUniverse apprised all along the way.

Can we put Plaintiff's 491 up on the
screen, please, Rick?

5 Slide 3. Can you blow up Slide 3?

As I mentioned earlier, the issue is
whether that decision in April was final. Final
in the sense that everything that Mr. Hernandez
and Ms. Eiss were doing after the fact was
10 totally irrelevant.

XpertUniverse has no good
explanation for what those two senior executives
were doing if that was really final in April of
2006.

15 And we showed you this yesterday.
XpertUniverse objected to it its admissibility.
We showed you this yesterday.

This is the flow chart as of April
2006 for how a partner gets approved in
20 SolutionsPlus. And right here, if the Governance
21 Council approves, you go on to Stage 3. If the
22 Governance Council doesn't approve, you go right
23 back here to the product manager.

24 Mr. Hernandez, John Hernandez was

that product manager. This was his understanding. This is a concealment case.

The next element that the jury is going to be asked to decide is whether Cisco
5 intended to deceive XpertUniverse.

That is directly focused on Mr. John Hernandez who was here in this courtroom yesterday, and you heard him testify for hours. I would submit to the jury you will ultimately
10 decide this fact.

That was not somebody who intended to deceive. That was somebody who understood the process, who played a role in the creation of this process. And his understanding and
15 experience was that if somebody does not get approved to SolutionsPlus by the Governance Council, it goes back to the business unit. It goes back to product management.

And instead of passing that
20 responsibility down to a replacement for Balaji Sundara, to Ross Daniels, any of those other
21 names you heard about, what did he do? He put it
22 on his shoulders and he sat there in the witness
23 box and told you that.
24

He made it his responsibility to work with the senior folks to try and get XpertUniverse across the finish line. And he did the best job that he could.

5 With relevance to Mr. Hernandez's intent to deceive XpertUniverse, that's the element that the jury's going to be looking at when you go back and do your deliberations. Did he intend to deceive XpertUniverse? What did
10 John Hernandez say?

Nobody gets into SolutionsPlus on the first try. That's his mindset.

He says -- he testified there are other companies who were denied SolutionsPlus and
15 then got in. He mentioned IP trade. He mentioned Esna.

He has experience and he knows that if the Governance Council doesn't let you in, you can take another run at them.

20 He also testified that in some instances, the objections are so significant, you
21 make the decision not to go back to the
22 Governance Council. But that's not what he did
23 here.
24

He thought he could build a business case to get them into SolutionsPlus. And in good faith, he did everything he could to try and get them in.

5 He immediately developed his plan. The plan focused on Citigroup.

Within a week, May 3rd, 2006 is that first email. John Hernandez, I spoke to Rob DePinto and he was not the pleased.

10 That's within a week of him finding out about the decision. And he took it on his shoulders and he built the business case.

He worked throughout the summer, spring and summer of 2006 to build a business case. He worked with Carl Wiese to try and get them approved. And he almost, almost got it across the finish line.

Why didn't he get it across the finish line? It has nothing to do with Cisco. It has nothing to do with the lack of effort or

21 fraudulent intent on the part of Mr. Hernandez.

22 Citigroup cancelled the pilot.

23 That's all this is about.

24 His business case was focused on

this major lighthouse account. Citigroup.

Citigroup cancelled the pilot. He ran out of gas.

There were no more lighthouse
5 accounts left. He tried for almost a year.

Now, Ms. Eiss said -- Ms. Eiss was
on the stand, and I thought it was a particularly
important moment when my partner, Mr. Damsgaard
asked her, confronted her with the fact that this
10 case is basically about accusing John Hernandez
of fraud.

And let's put up clip two and see
what Ms. Eiss said about that.

Do you understand he's accused of
15 fraud in this case?

Answer: I'm not going to touch on
that. What I'm going to say is that the
SolutionsPlus contract, which was vital to our
company, was always in progress and John was
20 supporting that. We -- I was never told that we
21 were denied the SolutionsPlus product until
22 January of 2007.

23 So, I, in good faith, and I believed
24 in good faith with John Hernandez -- I can't

2268
speak for what happened behind the scenes because
I wasn't privy to that. But, to my face, John
and I, other people at Cisco were working to that
end as well.

5 Ms. Eiss could not bring herself to
tell you that John Hernandez committed fraud. In
order for you to find fraud, you have to find an
intent to deceive. And I would submit there's no
evidence that John Hernandez intended to deceive
10 XpertUniverse.

 There were a lot of documents that
came in as trials do. Some of them came in with
Ms. Eiss. Some of them were published with John
Hernandez.

15 You don't have to write this down,
but after you go back there and you start your
deliberations, you're entitled to see these
exhibits. So I have some numbers in
chronological order that tell the story of
20 exactly what happened between XpertUniverse and

21 Cisco.

22 Plaintiff's 38.

23 Defendant's 457.

24 Defendant's 576.

Defendant's 575.

Defendant's 573.

Defendant's 435.

Defendant's 456.

5 Defendant's 433.

Defendant's 432.

Defendant's 373.

Defendant's 455.

Defendant's 579.

10 Plaintiff's 477.

Plaintiff's 478.

And Plaintiff's 41.

In chronological order, those tell
the story of what happened between John Hernandez
15 and Elizabeth Eiss with respect to SolutionsPlus
what I say is not evidence. What Mr. Cantine
says is not evidence.

The evidence is what you heard from
the witnesses and what's in those documents. And
20 if there's any doubt in your mind as to whether

21 Cisco or John Hernandez committed fraud, you can
22 refer back to any of those documents.

23 Two of the other elements that
24 XpertUniverse has to prove to your satisfaction

in order to establish fraud by concealment is that the denial of SolutionsPlus were -- the concealment of the denial of SolutionsPlus for those months caused damages to XpertUniverse.

5 And as I said to you in the opening statement, XpertUniverse died a natural death. Cisco did not cause XpertUniverse to fail in any way.

10 Nothing Cisco did caused them to fail. But most certainly, the denial of admission to the SolutionsPlus partner program or the concealment, alleged concealment of that denial for a number of months did not cause them to fail.

15 Remember, SolutionsPlus was a three-month pilot program. And to the extent XpertUniverse wants to say that draft contract didn't apply to them, it was also determinable at will by Cisco.

20 And that was in the power point that Ms. Eiss testified did apply to them, and this was also in the draft contract. And there's very, very good reasons for that.

24 This is not a big company taking

advantage of a small company. This is a big
company putting a small company's product on its
part list.

And that company has to take a risk
5 in putting that part on its part list. And it
also is entitled to take it off its part list.

For purposes of this litigation,
XpertUniverse is putting way more emphasis on
this three-month pilot program, putting way more
10 emphasis on the consequences of getting into the
program, and putting way more emphasis on the
consequences of not getting into the program than
it is due.

Getting into SolutionsPlus meant
15 nothing if you did not have a product for Cisco
to sell. And we know that XpertUniverse did not
have a product to sell.

Can we put up clip three, please?
This is Mr. Steinhoff, one of the directors of
20 technology.

21 "Question: And as you said,
22 XpertUniverse never completed a product to be
23 sold; is that right?

24 "Answer: Yes.

"Question: And you left in 2007;
right?

"Answer: Yes.

"Question: In July?

5 "Answer: Yes.

"Question: And at that time,
XpertUniverse still had no finished product;
right?

"Answer: That's correct."

10 I'm not going to go into a semantic
distinction of what a finished product is and it
isn't, but there was no product that Cisco could
have put on its price list if XpertUniverse had
been admitted to this SolutionsPlus program.

15 Mr. Hernandez also explained to you
very clearly and directly what it means to be a
SolutionsPlus partner. There are SolutionsPlus
partners that get admitted to this program
through this process we looked at, and they get
20 no money. Cisco can't sell their products, and
21 they get removed from SolutionsPlus.

22 And then they go into this other
23 partner program called the Technology Developer
24 Program and do just fine. There's no guaranteed

revenue for being a SolutionsPlus partner.

And, in fact, Mr. Hernandez gave you examples of companies that have done far better as members of this Technology Developer Program for which XpertUniverse claims has no value to it.

He mentioned Variant and Aquion, other companies that were technology developer partners and made lots of money having that Cisco stamp of approval. XpertUniverse was admitted to that program, and the only reason it didn't have value to XpertUniverse is because they never completed a product.

None of these partner programs are going to have value to you if there's no product that you can sell.

I want to talk for just a minute about this integration. We've heard a lot about Genesys. We've heard a lot about how Genesys was a competitor of Cisco.

That's not in dispute here. This isn't about competition.

XpertUniverse was building a product on the Genesys platform. Cisco thought the

technology looked interesting. You've heard that from a number of witnesses.

It's also undisputed. And they wanted XpertUniverse to build a version that was a Cisco version.

Mr. Friedman testified under oath that that integration was done in November 2006. Really? Where is it? We haven't seen a single document, not a single one.

In all the emails, all the product manuals, all the flow charts of all the arrows, you haven't seen a single piece of evidence that that integration was complete.

I mean, their favorite e-mail, right, you've seen that one. Remember, that was the one that was written at two in the morning. They never want to show you the bottom part of that e-mail, but we did, where he says, well, maybe this is all wrong. Maybe I got it all wrong, let's talk about it tomorrow.

In the two or three e-mails they keep showing you, take a look at the dates of them when you get back there. They're all in like a two, three-week window.

I showed you all the people on their side. The judge talked about weighing those scales, right, preponderance of the evidence? The scales tip pretty far in our favor.

5 The other thing I don't want to tell you about is Mr. Turillo made an invest. That directed his company to make that investment about two or three months after all those e-mails. He put another \$900,000 in the company.
10 Does that sound like someone that was trying to sell vaporware?

I mean, that's offensive. In facts, Mr. Turillo testified that he had no involvement in valuing XpertUniverse. Put that up, please,
15 Dave.

This is what he said in his sworn testimony.

"Question: Were you personally involved in any attempts in 2006 or 2007 to value
20 XpertUniverse as a business?

21 "Answer: No.

22 So they wanted to keep showing you
23 these Turillo e-mails saying, wow, he's saying
24 the value is so low, that XpertUniverse is miss

managed, it has got no will value. He wasn't
around valuing the company. You heard
Mr. Friedman tell you, loved him like a brother,
but he had a hot head. He sent e-mails out at
5 two in the morning. But three months later, he
invested another \$900,000 in the company.

Cisco likes to claim that there's no
value because we had no sales. Mr. Cop PEL, that
Citibank guy, he told you about that. He gave
10 you his thoughts. Said it didn't matter to him.
He liked the fact that XpertUniverse didn't have
any sales. That meant he wasn't selling it to
his competitors. Do you remember Dr. Chatterjee?
I'm losing my days. I don't know if he was
15 yesterday or the day before or what day it is,
but he talked about the fact that company he
worked for, the time it was sold, remember he
talked about it being sold to HP,
Hewlett-Packard? They're a big competitor. They
20 had a \$45 million loss on the books at the time
that company was sold. And Hewlett-Packard
bottomed them for \$470 million. So don't be fooled
23 by the no sales equals no value argument you're
24 going to hear from them.

Now let's talk quickly about that Governance Council. Mr. Hernandez told us yesterday that the Council had concerns, had questions. And you heard from Ms. Eiss. She told you all the work she was trying to do to overcome those questions, but she was very clear. There's a fundamental difference between a question and a denial. It's undisputed that no one from Cisco told anyone from XpertUniverse, including Ms. Eiss, that the Governance Council had denied their application in April 2006.

Mr. Hernandez reported, he didn't tell him, he didn't tell Ms. Eiss about the denial. He said they had questions. And she worked day and night preparing numerous presentations to address those questions that the Governance Council allegedly had. You saw all the e-mails. You saw the PowerPoint presentations.

Mr. Hernandez, he represented to XU that he would take all that work back, all Mrs. Eiss' work, and he would go back to the Governance Council. That's what he told you. But he never did.

He kept saying he'd take another crack, take another attack, I think was the word he used, on the Governance Council, but he never did did, because LEE told you himself yesterday, there never was another Governance Council MEET go for XpertUniverse. And he testified it was his sole discretion as the director of product management to represent XpertUniverse for the Governance Council. He said, yes, I don't need anybody's permission. He said, it's just an informal process. But there was never a second meeting.

He said, there's no schedule. He could have gone back to him at any time, but there was never any other meeting.

He told you that the vast majority of companies had multiple, multiple reviews through the Governance Council. But XpertUniverse only got one, in April 2006.

He appointed him as the new product manager when Mr. Sundara left. You know why? He said it was an exercise in influence. But the Governance Council never met again.

He took it upon himself, and he

never did anything. Despite all the work that Elizabeth infringing activity began, damages was doing at his urging, there's no evidence in the record that any of her work was ever presented to the Governance Council for a second vote. But he never told XpertUniverse any of this. Why? The evidence shows Genesys. Got to keep Genesys out of Citibank.

Cisco's concealment of this important fact led to the destruction of my client's company. Now, Mr. Bratic was here. He told you how to measure damages in a case like this. He told you about that but-for value; right? You take the will VA of the company before the bad act, you compare it to the value of the company after the bad act, and the difference is the damage.

Mr. Wagner was here this morning. He agreed. He said, yes, that but for thing, that's what I do in my work, too (HOOIFRP) FL

that's what these guys do. It's an accepted way to measure damages in a case like this.

Mr. Bratic told you about LOU he determined the value of XpertUniverse in that

April 2006 time frame. Mr. Wagner, their damages expert, I mean, he came in here today and said it's 0. That's his professional opinion, that my client was worth 0 in April 2006. Use your
5 common sense.

Mr. Bratic, he told you about how he relied on those Standard & Poor's valuation reports and the Duff & Phelps valuation report (report). Cisco's own expert admitted that's
10 what these guys do. When you try to value a company, you use reports like this.

Mr. Bratic told you how he analyzed those reports. He checked them. He investigated them. He tested them. And he told you how it
15 was the best evidence he could come up with of what the value was of XpertUniverse at that time. And we're not going to talk the numbers, but you heard him.

Counsel for Cisco told you in their
20 opening statement, pay attention to who has been really harmed here. I agree.

Cisco's actions destroyed my
22 company, my client's company. And people got
23 emotional here. People lost their jobs. They
24

lost their dreams.

Can you put it up, Dave.

That's what we're asking for. We think the evidence shows that a fair measure of damages is at least \$70 million. All I can ask you to do is use your moral compass, use your good judgment, use your common sense. We're asking, I'm asking you on behalf of my client to make Cisco pay for the consequences of their acts.

I really appreciate your time.

Thank you.

THE COURT: Thank you, Mr. Cantine.

So we're going to take a ten-minute break. Then we'll come back and Cisco will present its argument. All right?

(The jury was excused for a short recess.)

THE COURT: All right. Everyone be seated. Hopefully, I'm just going to get the jury verdict here. I can see that basically it's hot off the presses.

MR. ROVNER: We just not have had a chance to proof it.

THE COURT: No, no, I understand
that. Were you going to -- all right. Well, I'm
not going to sit here while you all hold it. I'm
going to take a recess. Contact me when you are
5 done.

(Short recess taken.)

THE CLERK: All rise.

THE COURT: Be seated, please.

THE COURT: I am not sure that -- we
10 just need the one copy.

MR. ROVNER: Do you want to give
each juror a verdict form?

THE COURT: I'm not -- well, okay.
In any event, I know there's one that we put with
15 a pretty blue backing --

MR. ROVNER: In the end.

THE COURT: -- in my memory of the
way law was practiced 30 years ago.

Okay. Is everybody ready now?

MR. SCHUMAN: Yes, Your Honor.
20

THE COURT: All right. Let's get
21 the jury in.
22

And Mr. Cantine, probably I'm just
23 going to -- I mean, I'll give you like 30
24

seconds, but probably just go to --

MR. CANTINE: I've got nine minutes left, Your Honor.

THE COURT: What's that?

5 MR. CANTINE: I have nine minutes left.

THE COURT: You get a 30-second break.

10 MR. CANTINE: Oh, all right. I can talk fast, but not that fast.

(Jury entering the courtroom at 3:48 p.m.)

15 THE COURT: Ladies and gentlemen, welcome back. Everyone be seated. We're ready to proceed.

Mr. Schuman.

MR. SCHUMAN: Thank you, Your Honor. Good afternoon, ladies and gentlemen.

20 And I can't tell you how proud I am to be representing Cisco Systems every time Mr.

21 Cantine points at me. This is a very good
22 company with great employees and great products.

23 And one of those employees is
24 Mr. Hernandez, who sat here yesterday and told

you the whole story, told you everything that happened as it relates to the issues that the jury is going to be asked to decide in this case.

In the opening statement, I did say snippets of emails stitched together by XU's counsel did not accurately represent what actually happened between Cisco and XpertUniverse. And now that all the evidence has come in, hopefully you appreciate that we showed you what I said.

There's lots of white noise going on in XpertUniverse's case, just like that white noise you hear every time counsel goes up to the side bar and the judge flips that switch.

There's actually some fairly narrow issues in this case for the jury to decide. And the Court gave you instructions and those are what you're going to be applying to the facts as they relate to the issues in the case.

You heard a lot of names, saw a lot of emails. Balaji Sundara, he left Cisco on May 15th, 2006.

We're talking about a case where there's alleged concealment between May 2006 and

January 2007. An email that he sent in May 4th, May 5th, something he said in his deposition right before he left, that doesn't prove fraudulent concealment.

5 Laurent Philonenko, he didn't have to come because what I said in my opening statement was he was going to tell you how he kept pushing XpertUniverse to do that integration. He didn't need to come. Ms. Eiss
10 said that on the stand in her testimony.

 Furthermore, this is a concealment case. As the jury now knows, the discussions here were between Mr. Hernandez and Ms. Eiss, and I'm going to focus on what Mr. Hernandez and Ms.
15 Eiss said when they were in that witness box explaining to you what actually happened here.

 Mr. Koepfel, that's white noise, also. He didn't come in and say anything about XpertUniverse's patents or Cisco's products. In
20 fact, the only patent he talked about was his
21 own.

22 He thought XpertUniverse's
23 technology was primitive. That was his word and
24 he was interested in it because he could apply

his patent to what they had built to date.

That's what Mr. Koeppel said.

Mr. Koeppel did not say anything about concealment. He mentioned SolutionsPlus.

5 He didn't say anything about the discussions between Mr. Hernandez and Ms. Eiss as they relate to the issue, the primary issue that you, the jury, is going to be asked to decide.

Mr. Hayden, the clip of testimony
10 you saw for the second time, Mr. Hayden did not say anything about the patents. He did not say anything about the accused Cisco products. He did not say anything about SolutionsPlus or concealment of any decision about XpertUniverse's
15 status in SolutionsPlus. This is all white noise.

Let me summarize the evidence for you on the concealment claim. Cisco did not conceal anything from XpertUniverse.

20 XpertUniverse, as the evidence
21 shows, was fully aware of its status as it
22 relates to SolutionsPlus from April 2006 to
23 January 2007. It was not admitted to the program
24 at that Governance Council meeting that you've

heard so much about. That is undisputed.

What is also undisputed is that XpertUniverse knew that fact. They knew they were not admitted at that April 2006 meeting.

5 And what happened after that? For the eight or nine months, Mr. Hernandez and Ms. Eiss worked together to try and get them admitted.

10 The fact that subsequent -- the fact that those subsequent efforts to get XpertUniverse admitted to the program were unsuccessful, does not establish that the denial in April 2006 was final. That's the proposition that XpertUniverse is asking you to accept.

15 That all that work that occurred -- these are not alleged emails or alleged approaches to Carl Wiese. These are things that Mr. Hernandez actually did.

20 You saw the emails. They exist. They're real.

21 You heard Mr. Hernandez tell the
22 story. All that work building the business case
23 to get XpertUniverse admitted to this program
24 actually happened.

And the fact that it didn't succeed
does not mean that that April 2006 decision was
actually final. It just so happened that those
subsequent efforts did not work.

5 Now, as I said, the fundamental
issue that a jury is going to be asked to decide
on the concealment claim, and this is jury
instruction number 12 you're going to get a
packet with the elements of what they have to
10 prove to show concealment. Element Number 2,
XpertUniverse did not know of the concealed fact.
Ms. Eiss testified on the stand she knew they
were not admitted to this program.

Rick, can we put up Clip Number 1?

15 This is Ms. Eiss' testimony from
last week. And what you heard from John
Hernandez after he explained that it had been
submitted to the Governance Council, and you
hadn't been admitted, that he wasn't going to
20 give up and that he was going to try and get this
21 thing in?

22 Answer: Correct. Yeah, John was
23 absolutely working with us. I never said he
24 wasn't.

I have viewed John as my partner.

And I viewed him as committed to getting this thing done because, frankly, XpertSHARE would help John be more successful in CCBU.

5 All of the emails, all of the phone calls that you heard about from Ms. Eiss and from Mr. Hernandez show you that XpertUniverse was fully apprised not only of the fact that it was not admitted to SolutionsPlus, but everything
10 Mr. Hernandez was doing to build the business case to get them into SolutionsPlus.

July 13th -- sorry. June 13th, 2006, Elizabeth Eiss sent an email to John Hernandez saying, I want to get back on track
15 with our SolutionsPlus agreement.

June 14th, the very next day, John responds immediately and tries to set up a call with Elizabeth. That's not somebody who's trying to conceal anything.

20 July 6th, there was some scheduling difficulties, as you might remember. They were
21 trying to get a call together. People weren't
22 available.
23

24 July 6th, 2006, Ms. Eiss, Victor

Friedman, they have a call and John explains on that call what happened at the Governance Council, and he explains what they need to do to get this thing across the finish line.

5 Those are his words. And he also testified on the stand that when that call happened, the context of that call was they already knew they were not admitted to the program.

10 Of course they knew they weren't admitted. Ms. Eiss was sending an email a month earlier saying, We need to get this thing back on track.

15 July of 2006, Ms. Eiss is working on power-point presentations for John to take to the Governance Council. You saw those presentations.

 We hear these concerns. Getting SolutionsPlus done. That's what those presentations that Ms. Eiss was preparing said.

20 She sent three iterations of those presentations. And in between each of those drafts that she sent over, there were conversations between Mr. Hernandez and Ms. Eiss.

24 Mr. Hernandez gave her feedback,

gave her input. Here's what you need to put in
here to get this thing across the finish line.
He was working with her to get them into
SolutionsPlus. He was not concealing anything
5 from her.

XpertUniverse in the person of Ms.
Eiss knew exactly what XpertUniverse's status
was.

August 31st, 2006, John tells Ms.
10 Eiss that he has the support of the Cisco IBM
Alliance Team. That is him building the business
case, getting key constituencies within Cisco to
support this, so he could go back to Carl Wiese
and the Governance Council and get XpertUniverse
15 across the finish line.

October 4th, you heard
Mr. Hernandez. His focus was on Citigroup.

Citigroup was the lighthouse
account. Citigroup was a major Cisco CCBU
20 customer. It also happened to be somebody that
21 XpertUniverse was talking with. That's why you
22 saw Mr. Koepfel here.

23 Mr. Hernandez did what good
24 executives do. He saw the synergy and he said,

Let's make Citigroup the lighthouse account. And
he went out to Rob DePinto, very senior person
within Cisco.

He was the owner within Cisco of
5 that Citigroup account to help him build that
business case. That was the email that Mr.
Cantine showed you.

That was rob DePinto building --
helping Mr. Hernandez build the business case.

10 But then what happens in October?
The Citigroup pilot still hadn't happened.

There are delays internal to
Citigroup. It has nothing to do with Cisco. May
not have anything to do with XpertUniverse,
15 either.

That pilot doesn't happen. But what
happens? An opportunity comes across
Mr. Hernandez's desk. FedEx needs something and
Cisco needs to find a way to -- excuse me. Cisco
20 needs to find a way to provide that to the other
21 good customer, FedEx.

22 What does Mr. Hernandez do? He
23 thinks outside the box.

24 He says, Wait a minute. This may be

another opportunity to get XpertUniverse across
the finish line.

That one didn't work out. FedEx.
There was a meeting. XpertUniverse knew about
5 this opportunity. No concealment.

There was a meeting, a call.
XpertUniverse spoke with Cisco. Spoke with
FedEx.

Let's figure out if this is a right
10 fit. This was not the right fit.

In the meantime, Mr. Hernandez had
went to Mr. Wiese. We saw that email. And what
was Mr. Wiese's response? I can support this via
SolutionsPlus.

15 Mr. Hernandez is actively working to
get them into SolutionsPlus and keeping
XpertUniverse apprised all along the way.

Can we put Plaintiff's 491 up on the
screen, please, Rick?

20 Slide 3. Can you blow up Slide 3?

21 As I mentioned earlier, the issue is
22 whether that decision in April was final. Final
23 in the sense that everything that Mr. Hernandez
24 and Ms. Eiss were doing after the fact was

Totally irrelevant.

XpertUniverse has no good explanation for what those two senior executives were doing if that was really final in April of 2006.

And we showed you this yesterday. XpertUniverse objected to it its admissibility. We showed you this yesterday.

This is the flow chart as of April 2006 for how a partner gets approved in SolutionsPlus. And right here, if the Governance Council approves, you go on to Stage 3. If the Governance Council doesn't approve, you go right back here to the product manager.

Mr. Hernandez, John Hernandez was that product manager. This was his understanding. This is a concealment case.

The next element that the jury is going to be asked to decide is whether Cisco intended to deceive XpertUniverse.

That is directly focused on Mr. John Hernandez who was here in this courtroom yesterday, and you heard him testify for hours. I would submit to the jury you will ultimately

decide this fact.

That was not somebody who intended to deceive. That was somebody who understood the process, who played a role in the creation of this process. And his understanding and experience was that if somebody does not get approved to SolutionsPlus by the Governance Council, it goes back to the business unit. It goes back to product management.

And instead of passing that responsibility down to a replacement for Balaji Sundara, to Ross Daniels, any of those other names you heard about, what did he do? He put it on his shoulders and he sat there in the witness box and told you that.

He made it his responsibility to work with the senior folks to try and get XpertUniverse across the finish line. And he did the best job that he could.

With relevance to Mr. Hernandez's intent to deceive XpertUniverse, that's the element that the jury's going to be looking at when you go back and do your deliberations. Did he intend to deceive XpertUniverse? What did

John Hernandez say?

Nobody gets into SolutionsPlus on the first try. That's his mindset.

He says -- he testified there are other companies who were denied SolutionsPlus and then got in. He mentioned IP trade. He mentioned Esna.

He has experience and he knows that if the Governance Council doesn't let you in, you can take another run at them.

He also testified that in some instances, the objections are so significant, you make the decision not to go back to the Governance Council. But that's not what he did here.

He thought he could build a business case to get them into SolutionsPlus. And in good faith, he did everything he could to try and get them in.

He immediately developed his plan.

The plan focused on Citigroup.

Within a week, May 3rd, 2006 is that first email. John Hernandez, I spoke to Rob DePinto and he was not the pleased.

That's within a week of him finding out about the decision. And he took it on his shoulders and he built the business case.

He worked throughout the summer, spring and summer of 2006 to build a business case. He worked with Carl Wiese to try and get them approved. And he almost, almost got it across the finish line.

Why didn't he get it across the finish line? It has nothing to do with Cisco. It has nothing to do with the lack of effort or fraudulent intent on the part of Mr. Hernandez.

Citigroup cancelled the pilot. That's all this is about.

His business case was focused on this major lighthouse account. Citigroup. Citigroup cancelled the pilot. He ran out of gas.

There were no more lighthouse accounts left. He tried for almost a year.

Now, Ms. Eiss said -- Ms. Eiss was on the stand, and I thought it was a particularly important moment when my partner, Mr. Damsgaard asked her, confronted her with the fact that this

case is basically about accusing John Hernandez
of fraud.

And let's put up clip two and see
what Ms. Eiss said about that.

5 Do you understand he's accused of
fraud in this case?

Answer: I'm not going to touch on
that. What I'm going to say is that the
SolutionsPlus contract, which was vital to our
10 company, was always in progress and John was
supporting that. We -- I was never told that we
were denied the SolutionsPlus product until
January of 2007.

So, I, in good faith, and I believed
15 in good faith with John Hernandez -- I can't
speak for what happened behind the scenes because
I wasn't privy to that. But, to my face, John
and I, other people at Cisco were working to that
end as well.

20 Ms. Eiss could not bring herself to
21 tell you that John Hernandez committed fraud. In
22 order for you to find fraud, you have to find an
23 intent to deceive. And I would submit there's no
24 evidence that John Hernandez intended to deceive

XpertUniverse.

There were a lot of documents that came in as trials do. Some of them came in with Ms. Eiss. Some of them were published with John Hernandez.

You don't have to write this down, but after you go back there and you start your deliberations, you're entitled to see these exhibits. So I have some numbers in chronological order that tell the story of exactly what happened between XpertUniverse and Cisco.

Plaintiff's 38.

Defendant's 457.

Defendant's 576.

Defendant's 575.

Defendant's 573.

Defendant's 435.

Defendant's 456.

Defendant's 433.

Defendant's 432.

Defendant's 373.

Defendant's 455.

Defendant's 579.

Plaintiff's 477.

Plaintiff's 478.

And Plaintiff's 41.

In chronological order, those tell
5 the story of what happened between John Hernandez
and Elizabeth Eiss with respect to SolutionsPlus
what I say is not evidence. What Mr. Cantine
says is not evidence.

The evidence is what you heard from
10 the witnesses and what's in those documents. And
if there's any doubt in your mind as to whether
Cisco or John Hernandez committed fraud, you can
refer back to any of those documents.

Two of the other elements that
15 XpertUniverse has to prove to your satisfaction
in order to establish fraud by concealment is
that the denial of SolutionsPlus were -- the
concealment of the denial of SolutionsPlus for
those months caused damages to XpertUniverse.

20 And as I said to you in the opening
21 statement, XpertUniverse died a natural death.
22 Cisco did not cause XpertUniverse to fail in any
23 way.

24 Nothing Cisco did caused them to

fail. But most certainly, the denial of admission to the SolutionsPlus partner program or the concealment, alleged concealment of that denial for a number of months did not cause them to fail.

Remember, SolutionsPlus was a three-month pilot program. And to the extent XpertUniverse wants to say that draft contract didn't apply to them, it was also determinable at will by Cisco.

And that was in the power point that Ms. Eiss testified did apply to them, and this was also in the draft contract. And there's very, very good reasons for that.

This is not a big company taking advantage of a small company. This is a big company putting a small company's product on its part list.

And that company has to take a risk in putting that part on its part list. And it also is entitled to take it off its part list.

For purposes of this litigation, XpertUniverse is putting way more emphasis on this three-month pilot program, putting way more

emphasis on the consequences of getting into the program, and putting way more emphasis on the consequences of not getting into the program than it is due.

5 Getting into SolutionsPlus meant nothing if you did not have a product for Cisco to sell. And we know that XpertUniverse did not have a product to sell.

Can we put up clip three, please?

10 This is Mr. Steinhoff, one of the directors of technology.

"Question: And as you said, XpertUniverse never completed a product to be sold; is that right?

15 "Answer: Yes.

"Question: And you left in 2007; right?

"Answer: Yes.

"Question: In July?

20 "Answer: Yes.

21 "Question: And at that time,
22 XpertUniverse still had no finished product;
23 right?

24 "Answer: That's correct."

I'm not going to go into a semantic distinction of what a finished product is and it isn't, but there was no product that Cisco could have put on its price list if XpertUniverse had been admitted to this SolutionsPlus program.

Mr. Hernandez also explained to you very clearly and directly what it means to be a SolutionsPlus partner. There are SolutionsPlus partners that get admitted to this program through this process we looked at, and they get no money. Cisco can't sell their products, and they get removed from SolutionsPlus.

And then they go into this other partner program called the Technology Developer Program and do just fine. There's no guaranteed revenue for being a SolutionsPlus partner.

And, in fact, Mr. Hernandez gave you examples of companies that have done far better as members of this Technology Developer Program for which XpertUniverse claims has no value to it.

He mentioned Variant and Aquion, other companies that were technology developer partners and made lots of money having that Cisco

stamp of approval. XpertUniverse was admitted to that program, and the only reason it didn't have value to XpertUniverse is because they never completed a product.

5 None of these partner programs are going to have value to you if there's no product that you can sell.

 I want to talk for just a minute about this integration. We've heard a lot about
10 Genesys. We've heard a lot about how Genesys was a competitor of Cisco.

 That's not in dispute here. This isn't about competition.

 XpertUniverse was building a product
15 on the Genesys platform. Cisco thought the technology looked interesting. You've heard that from a number of witnesses.

 It's also undisputed. And they wanted XpertUniverse to build a version that was
20 a Cisco version.

21 Mr. Friedman testified under oath
22 that that integration was done in November 2006.
23 Really? Where is it? We haven't seen a single
24 document, not a single one.

In all the emails, all the product manuals, all the flow charts of all the arrows, you haven't seen a single piece of evidence that that integration was complete.

5 Let's put up Mr. Zelkin's testimony, please. This is clip number four. Mr. Zelkin, you might recall, was the chief technology officer of XpertUniverse. He was there until July of 2007; after this alleged
10 concealment period ended.

 Let's see what Mr. Zelkin had to say about whether they had completed the integration of the product that potentially could have been in SolutionsPlus.

15 (Videotape deposition clip played as follows.)

 "Question: The last one is complete R2B7DX Cisco, maintain ability to deliver R2B7 in August and R2B7.5 in December, complete Cisco
20 S-plus, BI demo only, no ability to fulfill any
21 contract for software or services.

22 So was R2B7 to be the build that had
23 the integration with a Cisco product?

24 "Answer: Yes.

"Question: And R2B6 was the product
that still had the Genesys --

"Answer: Correct.

"Question: -- engine?

5 "Answer: Yes. Mm-hmm.

"Question: Did XpertUniverse ever
contemplate R2B7?

"Answer: If they did, it would be
after my employment.

10 "Question: Okay. So as of the time
you left, the Cisco integration was not
completed?

"Answer: No.

(End of videotaped deposition
15 excerpt.)

MR. SCHUMAN: That's the chief
technology officer. He left in July 2007 and he
said the integration was not complete. The Court
instructed you that you are entitled to determine
20 the credibility of witnesses, and I would submit

21 to you that Mr. Friedman's credibility, that
22 XpertUniverse actual completed there integration
23 in November 2006 is squarely an issue here.

24 Chief technology officer says it was

not done when he left in July of 2007, and
obviously it could not have been complete in
November of 2006. Other evidence that you do
have available confirms it was not done in
5 November 2006.

There was a memorandum from
Mr. David Rutberg, you remember, chief operating
officer, to Mr. Friedman in September 2006,
saying, we need 9 million more dollars to
10 complete the Cisco integration. We all know that
that XpertUniverse did not raise 9 million more
dollars after September 2006.

And there was another memo from Ms.
Eiss in December 2006, after Mr. Friedman claims
15 the integration was complete. And in that memo,
Ms. Eiss said dire development situation.

December 2006, dire development situation and
recommended disengaging with Cisco so as not to
do further harm to the relationship. There was
20 no integration. There was no product that could

21 have been in SolutionsPlus.

22 There was also no mention of
23 SolutionsPlus in any of the significant
24 correspondence that the jury has seen following

January 2007. If this was such a big deal, this alleged concealment from this three-month pilot program, you would expect to see it in an e-mail.

Mr. Friedman did not respond to John Hernandez's e-mail saying we're no longer considering are for SolutionsPlus. That was no claim at that time that you deceived us, that you defrauded us. We heard that for the first time when this lawsuit was filed over two years later.

Remember, there was that forged letter, where Mr. Friedman is blaming Mr. Zelkin for the downfall of XpertUniverse. The letter was May 31st, 2007, after this alleged concealment ended. There's no mention in there about Cisco or SolutionsPlus having anything to do with the downfall of XpertUniverse. That letter said, Mr. Zelkin drove this company into the ground.

August 14th, 2008, there's a letter to Spencer Trask, one of the companies that is funding XpertUniverse, saying, you your decision to stop funding us caused our business to fail. That's August 14, 2008. No mention in there of Cisco or SolutionsPlus or any concealment causing

this business to fail.

Mr. Friedman testified that XpertUniverse investors decided not to fund XpertUniverse as a result of learning for the first time in January 2007 that XpertUniverse had not been admitted to SolutionsPlus.

Where's the investors? No investor testified to that. You didn't see a single document, not an e-mail, not a letter. There's no evidence other than Mr. Friedman's testimony that investors stopped funding XpertUniverse when they heard that XpertUniverse was no longer a candidate for SolutionsPlus. It's pretty clear that that funding dried up when XpertUniverse was still a candidate for SolutionsPlus.

And you've heard a lot about options, vague discussion about options during this alleged concealment period. You've heard about Genesys, said that was an option. Mr. Cantine stressed Genesys in his closing argument.

There is no reason why somebody cannot be a Genesys partner and a Cisco partner at the same time, and Mr. Hernandez told you that yesterday and he gave you an example of a

Company, Nice, that has a product with Genesys
and a product with Cisco and you can have both.
And there's no evidence in this case, none, that
Cisco ever told XpertUniverse, you can't work
5 with Genesys if you are going to work with us.

Mr. Hernandez said yesterday that would be out of
-- that would be out of place.

And there's no evidence that
XpertUniverse had any option that it turned down
10 during this alleged concealment period,
April 2006 to January 2007, because of this
alleged concealment.

The other company they mentioned is
IBM. There's no evidence of any concrete option
15 from IBM during this alleged concealment period
that XpertUniverse turned down. You didn't hear
from anybody from -- from Genesys or IBM. No
witnesses came in here and said, we were prepared
to partner with them, but they didn't want us
20 because they were relying on Cisco. There's no
evidence of that whatsoever.

The only place that comes from is
22 from Mr. Friedman's testimony. And as the Court
23 said, you're entitled to consider the credibility
24

of witnesses and whether they have a stake in the litigation.

And I would submit to you that Mr. Friedman has the biggest stake in this litigation of all. He invested \$10 million in this company and it didn't succeed. And that's unfortunate. There's a lot of failed startups out there, but it's not Cisco's fault.

There are other reasons to question Mr. Friedman's credibility. You remember one of the big things he said was, he was trying to call John Hernandez to tell him this integration was complete. I was trying to call him. I was trying to call him. He wouldn't return my calls. I couldn't get ahold of him. Why didn't he send an e-mail? I wanted to tell him on the phone.

The evidence is that Mr. Hernandez and Mr. Friedman talked on the phone in January 2007, prior to getting that e-mail saying you're no longer a SolutionsPlus candidate. And as Mr. Hernandez said yesterday, Victor Friedman didn't tell me the integration was complete. He had the opportunity to do so and he did not and that e-mail, where he tells me you're no longer a

candidate for SolutionsPlus, January 22nd, 2007,
forwarded to Laurent Philonenko, says expected
escalation, because that's what we come to expect
now from our dealings with XpertUniverse.

5 In that e-mail, he confirms the
integration is not complete. When the
integration is complete, we'd be happy to
continue to do business with you as a technology
developer partner, that other program that many
10 other partners have done very well in.

 XpertUniverse wants a really big
number here. They put it up on the board and you
heard Mr. Bratic say it: \$70 million. Not only
is Cisco not responsible for XpertUniverse's
15 demise, but \$70 million is not the value of
XpertUniverse at any point in time. And you
heard two different damages experts. You heard
Mr. Bratic and then you heard Mr. Wagner, and you
heard discussion about some documents that you
20 are not going to see. And the issue is whether
21 it's appropriate for Mr. Bratic to be relying on
22 these documents for purposes of forming his
23 opinion that this company was worth \$70 million,
24 a company with no customers, no products, no

revenues.

As you heard from the cross-examination of Mr. Bratic and also from Mr. Wagner today, the fundamental problem with what Mr. Bratic did here is those documents that you are not going to see were based on projections from XpertUniverse management and nothing more.

Can we put up number 17, please, Rick, the graphic.

Remember this from this morning? It seems like a long time ago, but it was just this morning. Management projections is the foundation for everything that Duff & Phelps and Standard & Poor's did. They did not check them. There was nothing to check. XpertUniverse said, this is what we think we will do by 2010. That's the foundation. Everything on top, multipliers, discount factors, comparable, all that stuff, that's what Duff & Phelps added. And that's what Mr. Bratic claims he checked. But the one thing he couldn't check, because nobody could check it, are the management projections that form the foundation for this valuation.

XpertUniverse says, this is how well I think I'm going to do, even though I don't have a finished product yet. Duff & Phelps takes that, applies a factor it, capitalizes it, gives it a discount factor and says \$70 million. It's not the value of XpertUniverse and it's not XpertUniverse's damages in this case, I would submit.

I'm not going to show you the Mike Turillo e-mails again. You've seen them a couple times now. I don't think you need to see them again. But they are significant because Mike Turillo had a lot to say about the value of XpertUniverse at the relevant time.

Mr. Cantine said those e-mails are from back in February 2006. Think about that. That is the time period that Mr. Bratic was focusing on, before April 2006, pretty close in time, before the alleged concealment began.

Mr. Turillo said this business might not even be worth \$5 million. Mr. Bratic just blindly accepted the Duff & Phelps number without considering any of this other evidence.

One point about Mr. Turillo I would

just like to remind the jury of. We heard from Mr. Friedman and we heard from Mr. Cantine that he barely ever came into the office. He didn't know what was really going on at XpertUniverse when he was writing those e-mails.

The video deposition clip we played yesterday from Mr. Turillo said that in late 2005, early 2006, he was spending 90 percent of his time at XpertUniverse and had excellent transparency into the business and spoke with Victor Friedman daily. That's his sworn testimony in the deposition video you saw yesterday.

I don't think you get to the value of XpertUniverse's business or its technology because Cisco didn't do anything to cause that business to fail, but if you do, you need to consider what Mr. Wagner said.

On the question of the value of XpertUniverse, the market has spoken.

XpertUniverse failed. There's no doubt about that.

The accused Cisco products, which I will get to in a minute, the allegation is those

products actually use XpertUniverse's IP. We don't think that's right, but if it is right, those products didn't do any better. All the accused products are either discounted, dead, or the one product, Remote Expert, that is not dead, was projected to do this much in revenue (indicating) and as you heard for the last couple of days, it had one pilot at Home Depot.

And the market, nobody knows the market better than John Hernandez, and John Hernandez told you that there had been many companies trying to do what XpertUniverse was trying to do here, get expert, subject matter experts, people outside the Contact Center Enterprise involved in helping solve customer problems and nobody has been able to do it.

The reason Cisco was interested in XpertUniverse was because they claimed they could do it, but they couldn't and all they had was a demo, and they failed.

I want to turn to the patent case quickly. We're almost out of time here.

A general comment about the patent case. I know it's hard to follow. It's hard for

patent lawyers to follow sometimes. But these
accused products you've heard about, Expert
Advisor, Remote Expert, Pulse, I would submit to
you that these are square pegs that do not fit in
5 the round holes of these patents. Dr.

Nourbakhsh and XpertUniverse are trying to
squeeze products that have nothing to do with
these products into the claims.

The first patent, the '709 patent.

10 Can you put up CL6, please.

The '709 patent, remember, we showed
you all those graphical user interfaces. The
'709 patent is about the look and feel of the
platform, a web page. Remember Mr. Lepore came
15 down from Massachusetts to tell you about this
product. He designed this product. He created
it. Nobody knows better how this product works.

Expert Advisor is a telephone call
only. There's no graphical user interface. It's
20 a telephone call. It cannot possibly infringe

21 the '709 patent. I don't need to show you the
22 hurdles. You can knock them all down. A
23 telephone call cannot infringe a patent that
24 requires a graphical user interface or the

presentation of something graphically to a
user.

Pulse. You heard from Mr. Gannu,
the engineer who designed Pulse. Cisco has no
5 burden to show you these products do not
infringe. The Court gave you the instruction.
XpertUniverse must prove to you these products
infringe. But we brought the engineers who
designed the accused products to explain to you
10 very clearly how they work.

Pulse is a search engine. That's
it. It's like Google. You heard Mr. Gannu.
That's a search bar at the top that's like
Google. You type in anything you want.

15 Dr. Nourbakhsh mentioned this thing
called a tag cloud. You click on a tag. It runs
a search. There's nothing more to it than that.
There's not enough stuff on the interface to
infringe the patent.

20 The other patent, the '903 patent --

21 can we put up CL7, please. Remember this,
22 complicated diagram? I'm not going to go through
23 it now. I don't have time. Mr. Lepore walked
24 you through the whole thing. This is the '903

patent applied to this.

Dr. Nourakhsh's theory is that these things over here, assignments, queues, are organized from these things over here, call types. Mr. Lepore built the product. He explained to you, carefully demonstrated to you, there's no connection between the two whatsoever.

These things are not organized from these things, noninfringement with respect to Expert Advisor on the '903 patent.

Remote Expert, we bought you Bill Dry. It's a button that you push at Home Depot and it makes a phone call to a group of agents.

Dr. Nourbakhsh, I would submit to you, when he talked up there on the witness stand about why he thinks it infringes, he did not tie anything in Remote Expert to any of the elements of claim 12 of the '903 patent.

Push the decorator button, calls a phone number, gets you a group of agents. That does not infringe the patent.

I want to talk about invalidity very briefly. We have the burden of proof there and I would submit to you that we carried that burden.

Remember Dr. Chatterjee, he was in here. He
looked at all that code. You might have been
wondering, why did he do that? Because he found
in the code that these patents were in the code
prior to the critical date. XpertUniverse had
embedded these patents in their software prior to
the critical date.

And I have to connect the dots for
you here because we didn't show them to you, but
the patents are invalid if prior to the critical
date, XpertUniverse was offering for sale a
product that embodied these patents.

And I would just quickly put up on
the screen, please, Rick, Defendant's 110.

Defendant's 110, March 3rd, 2003.
That's before April 2nd, 2003, the critical date.

And if we go to the second page --
third page, please, next page. XpertUniverse,
prior to the critical date, when their inventions
are in their code is offering Allstate

KnowledgeSHARE. That's the product that Dr.
Chatterjee examined. KnowledgeSHARE embodied the
inventions. KnowledgeSHARE was being offered to
Allstate.

Remember what Dr. Chatterjee said?

It's black and white. It's either in the code or
it's not. He found it in the code. They offered
it for sale. It does not matter that they didn't
5 actually succeed in selling it to Allstate. We
know they didn't succeed in selling it to
anybody. It also does not matter that it wasn't
a finished product. The law is that if they
offer the invention in the patents for sale prior
10 to the critical date, those patents are invalid.
And I would submit to you that we have proven the
patents are invalid.

In closing, Cisco did nothing wrong
here. It did nothing to hurt XpertUniverse.
15 XpertUniverse is just one of many failed
startups.

Cisco wanted, wanted this
relationship to work. Why else would John
Hernandez have done all the things that he did?
20 Those are not alleged things. Those really
21 happened.

Those e-mails to Carl Wiese, Senior
22 Vice President at Cisco, John put his credibility
23 on the line for XpertUniverse. He was
24

disappointed it didn't work out. He and Cisco are doubly disappointed to find itself in this lawsuit being accused of fraud for its efforts.

You should not order Cisco to pay
5 any money to XpertUniverse for its business failure that Cisco did nothing to bring about. XpertUniverse's lawyers have done their very best to spin a story, to connect this three-month pilot program, SolutionsPlus, to its own business
10 failure, but I would submit the evidence is just not there.

This is where I ended the opening as well. Remember what Mr. Turillo said to Mr. Friedman in one of those many e-mails. He
15 said, it's okay to fool others. I disagree with Mr. Turillo. It's never okay to try to fool anybody, and it's certainly not okay to try to fool a Court of law.

I want to thank you for your time
20 and attention. It was only a little over a week ago, it seems like a lot longer than for me.
21 You've seen lots of evidence, lots of technical
22 information, patents, source code, and I'm sure
23 it was difficult to follow, but on behalf of my
24

client, Cisco, my hard-working team, I want to
thank you for your time and attention.

THE COURT: All right. Thank you,
Mr. Schuman.

5 We're going to take about one
minute, which I encourage you to just stand up in
your place while Mr. Cantine gets his thoughts
together. He's going to speak for nine minutes
or less.

10 MR. CANTINE: Less, your Honor.

THE COURT: Less. I'm going to
stand up, so, you know, you don't have to.

(Pause.)

MR. CANTINE: I'm ready.

15 THE COURT: All right. All right,
Mr. Cantine.

MR. CANTINE: So I get the last
word. That's always good.

20 Now, I'm not really sure where to
start there. Mr. Schuman was suggesting that Mr.

21 Hernandez was the champion, that it was somehow
22 wrong for Ms. Eiss not to throw him under the bus
23 when she got up on the stand. But she told you
24 the truth. She told you what she thought,

Because she thought that Mr. Hernandez was the champion.

And Mr. Schuman is suggesting that somehow, when Mr. Friedman responded to that January 2007 e-mail, he's supposed to mention all this concealment, all of the denial from SolutionsPlus. Where's the anger, he said?

Well, you know, we didn't learn about it until we got in litigation. We didn't have all these e-mails about stalling and calling us a competitor. Those came out in litigation. You know, that somehow Mr. Friedman is supposed to mention those in his e-mail back to Mr. Hernandez, gee, thanks for letting me know about SolutionsPlus. I guess I will find out later about all the stalling and the competitor and everything else. I mean, it's ridiculous. Use your common sense.

And to criticize Ms. Eiss for sitting up there and not knowing what she knows now, to criticize her for not taking some shots at Mr. Hernandez. I think she ought to be awarded.

They want to keep arguing this

three-month pilot program. Did they ever show you a signed contract? No. Some draft template? They never put a signed contract in front of you. It's meaningless.

5 They talk about this SolutionsPlus program. I was listening closely; right? I'm sorry, about that other technology program. We could admit you, we could deny you, we could kick you out. No guarantees. It doesn't sound like a
10 great partner program to me.

 They criticize the Standard & Poor's and Duff & Phelps reports, but their own witness, their own expert said, this is what these guys rely on. It was tested. It was analyzed. It
15 was reviewed. It's the best evidence they had. We're looking back. We're trying to figure out what the company was worth in April 2006.

 Put that claim up, please.

 Now, what was remarkable about the
20 closing statements, you didn't hear any remorse, didn't hear any regret, didn't hear any sorrow. I heard a lot of anger. And I'm telling you, to
21 hear again that my client died a natural death,
22 use your common sense. That's what we asked you
23
24

in the beginning.

That's what we're asking for. You
are going to have a verdict form. It's going to
be item number A, fraudulent concealment. Did we
5 prove our claim? Answer yes or no. I want you
to write in yes.

It's going to ask you what damages
you award. That's what we're asking for. And on
behalf of my client, thank you for your time. It
10 has been a long week-and-a-half, but really
appreciate it. Thank you very much.

That's all, your Honor.

THE COURT: Thank you, Mr. Cantine.

Members of the Jury, let me finish
15 up by explaining some things about your
deliberations in the jury room and your possible
verdicts.

Once you start deliberating, do not
talk to the jury officer or to me or to anyone
20 else except each other about the case. If you
21 have any questions or messages, you must write
22 them down on a piece of paper, sign them, and
23 then give them to the jury officer.

24 The officer will give them to me and

I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take some time to get back to you. Any questions or messages normally should be sent to me through your foreperson who, by the custom of this Court, is Juror No. 1.

One more thing about messages. Do not ever write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that you are split five to three or six to two, and whatever your vote happens to be. That should stay secret until you're finished.

Your verdict must represent the considered judgment of each juror. In order for a jury to return a verdict, it is necessary that each jury agree to the verdict. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view towards reaching an agreement if you can do so without violence to your individual judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow

jurors. In the course of your deliberations, do
not hesitate to re-examine your own views and
change your opinion if convinced it is erroneous.
But do not surrender your honest conviction as to
5 the weight or effect of evidence solely because
of the opinion your fellow jurors or for the
purpose of returning a verdict.

Remember at all times that you are
not partisans, you are judges, judges of the
10 facts. Your sole interest is to seek the truth
from the evidence in the case.

A form of verdict has been prepared
for you. It is basically two pages of questions,
which can be answered yes or no, or in the
15 questions that involve damages, if you find
awarding damages is appropriate, then you write
in a number. And so you will have that with you
and it basically provides the questions that you
need to answer.

20 You will take this form to the jury
room and when you reached unanimous agreement as
21 to your verdict, you will have your foreperson
22 fill in, date and sign the form. Then each of
23 you will be asked to sign it also. You will then
24

return to the courtroom. My deputy will read
aloud your verdict.

It is proper for me to add the
caution that nothing said in these instructions
5 and nothing in the form of the verdict is
meant to suggest or convey in any way or manner
any intimation or hint as to what verdict I think
you should find. What the verdict shall be is
your sole and exclusive duty and responsibility.

10 Now that all the evidence is in and
the arguments are completed, you will be free to
talk about the case in the jury room. In fact,
it is your duty to talk with each other about the
evidence and make every reasonable effort you can
15 to reach unanimous agreement. Talk with each
other, listen carefully and respectfully to each
other's views and keep an open mind as you listen
to what your fellow jurors have to say.

Try your best to work out your
20 differences. Do not hesitate to change your mind
21 if you are convinced that other jurors are
22 right and that your original position was wrong.
23 But do not ever change your mind just because
24 other jurors see things differently or just to

get the case over with. In the end, your vote must be exactly that, your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good
5 conscience.

No one will be allowed to hear your discussions in the jury room and no record will be made of what you say. So you should all feel free to speak your minds.

10 Listen carefully to what the other jurors have to say and then decide for yourself.

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may
15 not use any electronic device or media, such as the telephone, a cellphone, a smart phone, an iPhone, a Blackberry, the computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog
20 or website -- I'm sorry, I didn't write this

21 part -- such as Facebook, MySpace, LinkedIn, YouTube or Twitter -- although I didn't write it,
22 the message is very important -- to communicate
23 to anyone any information about this case or to
24

conduct any research about this case until I
accept your verdict.

In other words, you cannot talk to
anyone on the phone, correspond with anyone or
5 electronically communicate with anyone about this
case. You can only discuss the case in the jury
room with your fellow jurors during
deliberations.

Lastly, let me finish by repeating
10 something I said to you earlier. Nothing that I
have said or done during this trial was meant to
influence your decision in any way. You must
decide the case yourselves based on the evidence
presented.

15 So before I send you back, because
we're going to swear the bailiff, take you back,
it is obviously late in the day. And so what I'm
thinking is that you'll go back and get yourself
organized, but that I expect that unless you
20 unanimously decide you want to stay after

21 5:00 o'clock, that at 5:00 o'clock you'll just go
22 home and you'll come back tomorrow so that you
23 are all here by 9:30. And until you are all
24 here, you won't discuss the case. You'll only

discuss the case when all eight of you are here.

All right?

So can we have the bailiff sworn?

(Court Security Office sworn.)

5 THE COURT: All right. If you would
go with the Court Security Officer.

(The jury was excused to the jury
room.)

THE COURT: Mr. Cantine?

10 MR. CANTINE: I have not had a
chance to talk to my local counsel, your Honor,
but I think there are at least two things in that
closing statement that were improper.

THE COURT: Before we do that, let's
15 just deal with the jury.

Does anybody object this is what
typically happens, that they just go home without
being brought back into court?

MR. CANTINE: Yes. I mean, at
20 5:00 o'clock, yes. We don't need to see them.

21 THE COURT: Okay. And that tomorrow
22 morning, they just start up again. There's no
23 need to say good morning to them at 9:30?

24 MR. ROVNER: That's right.

MR. CANTINE: Yes. I mean, do you
want us here?

THE COURT: No, no, no, no. As far
as I'm concerned, you can -- yeah. The Deputy
5 Clerk will make sure. She has many different
ways of contacting probably Mr. Rovner and Mr.
Blumenfeld, but however you want to arrange it,
just so you can be brought back.

Because if they do have a question
10 or a note, I'm going to authorize my staff to
tell you what's written in the note when she
calls to bring you over here.

MR. CANTINE: Before we get here?

THE COURT: Yeah.

15 MR. CANTINE: Okay.

THE COURT: So you can be thinking
about it.

MR. CANTINE: Gotcha.

THE COURT: I always hated when I
20 was a lawyer and the judge had a 30-minute head

21 start. But so, you know, I expect you should be
22 able to get over here in ten minutes because I'm
23 not going to respond to anything without getting
24 input.

MR. CANTINE: Right. We're a block
away, so...

THE COURT: Okay. And in any event,
Cisco is all good with that?

5 MR. SCHUMAN: Yes, Your Honor.

THE COURT: So, Mr. Cantine, you
were saying two objectionable things. I noticed
one.

What was the other?

10 MR. CANTINE: That this evidence was
admitted over objection.

THE COURT: Well, that's the one I
noticed. What was the other?

MR. CANTINE: The forged document.
15 There's evidence of a forged document.

THE COURT: Well, so what is your --

MR. CANTINE: I don't know if we
need some instruction or something. I don't
know.

20 It's hanging out there that there's
21 forged evidence and suggesting that Mr. Friedman
22 was not all that honest on the stand.

23 I don't want the jury making the
24 wrong conclusion, Your Honor.

THE COURT: Well, I thought the context was -- maybe I wasn't paying attention sufficiently, but I thought the context was in regards to this May 31st, 2007 document, which
5 based on the testimony, that it was on his computer. He denied writing it.

MR. CANTINE: That is not evidence of forgery.

THE COURT: Well --

10 MR. CANTINE: I mean, that is a completely improper inference for the jury to be taking back. I didn't stand up and object because I wanted him to finish, and now I'm being punished twice.

15 THE COURT: Well, all right. I hear your. I hear your complaint.

Mr. Schuman.

MR. SCHUMAN: Your Honor, I think we established or at least established a basis for
20 me to make the closing argument to the jury that

21 that letter was forged. We've had a lot of
22 discussion about that letter in this case.

23 I didn't publish it to the jury
24 here. We asked Mr. Friedman on the stand, did

you write it? He said, No.

THE COURT: Actually, you know what.
I'm thinking it is because, of course, the idea
was it said it was coming from Zvia Faro.

5 MR. SCHUMAN: Correct.

THE COURT: And we know there's a
lot of evidence that she didn't actually write
it.

MR. SCHUMAN: Correct.

10 THE COURT: Right. We disagree with
that as a factual basis.

MR. CANTINE: She denied writing it.
That evidence is not here.

THE COURT: Well, I thought that
15 actually Mr. Friedman testified to that.

MR. SCHUMAN: He did. He testified
that he discussed it with her and she denied
writing it.

THE COURT: And I think he also said
20 that he believed that she did not write it.

21 MR. CANTINE: That doesn't make it a
22 forged document. It makes it a document that
23 nobody knows who wrote.

24 THE COURT: Well, you know, to me,

it's not a stretch of the English language to say
that if you have something that's signed Zvia
Faro and Zvia Faro didn't write it and didn't
authorize the writing, that's a forged document.

5 MR. CANTINE: I'm not sure. It's
not signed.

It's a draft. It was never sent.
Never saw the light of day.

That's the evidence. It came off of
10 his computer.

He denied writing it. She denied
writing it. That does not make it a forgery,
Your Honor.

THE COURT: All right.

15 MR. CANTINE: That makes it an
unauthen -- unauthen -- I can't say the word.

THE COURT: Unauthenticated?

MR. CANTINE: Thank you. That
doesn't make it a forgery. And he's trying to
20 tie it to my client.

21 THE COURT: Well, actually, I mean,
22 tying it to your client, I think, is perfectly
23 legitimate.

24 MR. CANTINE: Not a forgery.

THE COURT: Well, you know, and I
don't think -- he wasn't used -- you know, part
of the reason why I guess I didn't -- it didn't
ring a big bell with me, I didn't understand him
5 to be saying a crime was committed here. I think
what he was saying --

MR. CANTINE: Well, did you hear all
the credibility arguments, all the credibility
arguments he was making in his closing statement?
10 He's trying to leave the inference with the jury
that my client was not truthful on the stand and
forged this document.

THE COURT: All right. Well, I
understand what you're saying and I don't think
15 it was -- I don't think it was an unfair comment
on the evidence.

And I think there was an evidentiary
support for it. So I'm going to -- you know,
your objection is noted, but I'm not going to do
20 anything about it.

MR. CANTINE: All right. What about
21 the other one?

THE COURT: Well, Mr. Schuman, I
23 couldn't help but notice that you referred to it
24

for no good reason. And I assume that that was
part of getting the 40 minutes done.

But what do you think about that.

MR. SCHUMAN: Well, Your Honor, and
5 I I'm not actually clear exactly what I said
about it at this point because I was rushing.

THE COURT: You said at 4:01, the
SolutionsPlus approval process and you put up the
diagram, let's call it Version 2 where it shows
10 the loop back. And you said to which
XpertUniverse objected to its admissibility. I
mean you did because --

MR. SCHUMAN: I remember that.

THE COURT: Mr. Cantine could spot
15 that one.

MR. SCHUMAN: Well, and so, Your
Honor, all I can do is apologize to the Court.
If an appropriate curative instruction is
necessary, that's fine.

THE COURT: Well, and I guess the
20 question is do -- all right. I mean, do you want
21 me to give a curative instruction, Mr. Cantine?
22

MR. CANTINE: Please.

THE COURT: All right. And how

would you like me to do that? Call them back
now?

MR. CANTINE: I think that's
appropriate before they make any decision. And I
5 think it should be attributed to counsel for
Cisco.

THE COURT: Well, obviously, I'm
going to tell them that I'm striking it. I'm not
going to --

10 MR. CANTINE: I don't want to leave
it hanging out there that one of us said it.

THE COURT: All right. Well, I
think that's your choice because I do think Mr.
Schuman should not have said it clearly. And, so
15 I guess, can we go bring the jury back in?

You can all sit down. Sorry.

Of course, now you can stand back
up.

The people in the audience, you
20 don't have to stand.

21 (Jury entering the courtroom at 4:54
22 54 p.m.)

23 THE COURT: Members of the Jury,
24 thank you for coming back. There is one thing

that I should have done something about, but I didn't.

During the closing argument by Mr. Schuman, about ten minutes into it, he mentioned that he referred to an exhibit put up on the screen and stated that XpertUniverse had objected to its admissibility. That was an improper comment on the evidence.

And I've told you about the rulings and objections lawyers need to do when they think the Rules of Evidence require. So I am striking that remark and asking you to disregard it.

All right?

THE JURY: Okay.

THE COURT: Okay. You can go back. Thank you.

(Jury leaving the courtroom at 4:55 p.m.)

THE COURT: All right. I imagine perhaps there's some work to be -- everyone sit down -- that there's some work to be done with the Courtroom Deputy about exhibits. And so it's probably a good time to start doing that.

No? Yes?

Oh, these are all taken care of?

THE CLERK: Yes.

THE COURT: Okay. Apparently it was all taken care of. Good work on everyone's part.

5 Is anything else to do other than say goodnight?

MR. SOBEL: Can we be heard on two minutes for the issue of punitive damages?

10 THE COURT: Well, that ship has sailed, but if you'd like to talk about it for two minutes, go ahead.

MR. SOBEL: Thank you, Your Honor. We submit that there was evidence in our case in chief that those involved with the alleged
15 tortious concealment here, there's a lot of emails, and they demonstrate that people on those emails, including Mr. Hernandez were all managing agents of Cisco. That's within the documentary evidence itself. And it demonstrates that
20 they're managers.

21 And under the California Supreme
22 Court case that we cited to you in the letter,
23 that meets the test, which is an issue for the
24 jury. And in the event, even though -- even if

that wasn't sufficient for our case in chief,
that seemed to be the issue that you base your
ruling on.

We've done some research and, you
5 know, I submit this is a procedural issue under
Federal Law of whether -- you know, whether the
evidence from the entire case can be considered
to support us going to the jury on punitive
damages.

10 And in my preliminary research, I
took a look at Foster v. Nutritional Fuel
Company, in the Third Circuit case, 316, F.3d
424, 2003 which suggests that you can use
evidence from the entire case to cure any lack of
15 evidence. In this situation, under Rule 50.

And, also, I think that, for
equitable reasons, that there would be no harm
if, after the jury came back, they were charged
on punitives because -- and if you take that --
20 if it turns out that afterwards you want to, you

21 know, deal with it on a post-trial motion as
22 opposed to some substantial prejudice in having a
23 whole new trial, I think that the scale of the
24 substantial prejudice that might occur, even if

you think that it's likely there's no basis, that because it's such substantial prejudice and a little harm in having the jury deciding on the question, that it should be given to the jury.

5 THE COURT: All right. Well, thank you, Mr. Sobel.

I will look at the case you cited. And if it causes me to have some second thoughts, or whatever it causes me, I'll let you know.

10 Okay. Anything else?

All right. Well, you know, at some point, one side or the other is probably not going to be very happy, so let me just thank you all for the efforts you put into the case.

15 And, you know, I thought in particular, except the one sentence that Mr. Schuman said, both closing arguments were very good by both sides. I think you properly framed the issues for the jury.

20 So I don't know what they'll decide,

21 but it's a good job by both sides, and

22 particularly Mr. Cantine and Mr. Schuman.

23 So, thank you.

24 MR. CANTINE: Thank you, Your Honor.

MR. SCHUMAN: Thank you, Your Honor.

THE CLERK: All rise.

(Court was recessed at 4:59 p.m.)

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State of Delaware)
)
New Castle County)

CERTIFICATE OF REPORTER

5 I, Heather M. Triozzi, Certified
Professional Reporter, Registered Professional
Reporter, and Notary Public in the State of
Delaware, do hereby certify that the foregoing
record, Pages 2005 to 2354 inclusive, is a true
and accurate record of the above-captioned
proceedings held on March 20, 2013, in
Wilmington.

10 In witness whereof, this 20th day of
March, 2013, at Wilmington.

Heather M. Triozzi, CSR, RPR
Cert. No: 184-PS
Exp: Permanent

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